No. 96-1654-CFY Title: Frank J. Muscarello, Petitioner
v.
United States

Docketed: April 18, 1997 Court: United States Court of Appeals for the Fifth Circuit

| Entry | Date | Proceedings and Orders |
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| | Apr 18 1997 | Petition for writ of certiorari filed. (Response due June 18, 1997) |
| | May 15 1997 | Order extending time to file response to petition until June 18, 1997. |
| | Jun 18 1997 | Brief of respondent United States in opposition filed. |
| | Jul 2 1997 | DISTRIBUTED. September 29, 1997 |
| | Jul 7 1997 | Reply brief of petitioner Frank J. Muscarello filed. |
| | Nov 25 1997 | REDISTRIBUTED. December 12, 1997 |
| | Dec 12 1997 | Petition GRANTED. The brief of peittioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, January 23, 1998. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 20, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 18, 1998. Rule 29.2 does not apply.<br>SET FOR ARGUMENT March 23, 1998.<br>********** |
| | Jan 7 1998 | Record filed. |
| | Jan 23 1998 | Brief amicus curiae of National Association of Criminal Defense Lawyers, et al. filed. VIDED. |
| | Jan 23 1998 | Joint appendix filed. |
| | Jan 23 1998 | Brief of petitioner Frank Muscarello filed. |
| | Feb 20 1998 | Brief of respondent United States filed. VIDED. |
| | Feb 23 1998 | CIRCULATED. |
| | Feb 24 1998 | Motion of petitioners for divided argument filed. |
| | Mar 9 1998 | Motion of petitioners for divided argument GRANTED. |
| | Mar 16 1998 | Reply brief of petitioner Frank Muscarello filed. |
| | Mar 23 1998 | ARGUED. |

EDITOR'S NOTE

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No. 96-

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

FRANK J. MUSCARELLO,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition for a Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether 18 U.S.C. § 924(c)(1), which imposes a five-year prison term upon anyone who "carries" a weapon during and in relation to any drug-trafficking crime, is violated when a defendant knowingly possesses a firearm in the locked glove compartment of a truck, but could not readily access the firearm during the commission of the underlying crime.

## PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit were Frank J. Muscarello, as Defendant-Appellee, and the United States of America, as Appellant.



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## PETITION FOR A WRIT OF CERTIORARI

Frank J. Muscarello respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 106 F.3d 636, and is reprinted at pages 1a-7a of the appendix to this petition. The opinion of the United States District Court for the Eastern District of Louisiana, granting petitioner's motion to quash or dismiss count 3 of the indictment against him, is not officially reported, although it is available at 1996 WL 173374, and is reprinted at pages 8a-11a of the appendix to this petition. The district court's opinion denying the government's motion for reconsideration is unreported; it is reprinted at pages 12a-13a of the appendix to this petition.

## JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 13, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

## STATUTORY PROVISION INVOLVED

Section 924(c)(1) of Title 18, United States Code, provides:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection,

such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

## STATEMENT

This case presents an important issue of federal criminal law: the meaning of the phrase "carries a firearm," as used in 18 U.S.C. § 924(c)(1). This is a question on which the courts of appeals are hopelessly divided.

1. Petitioner Frank J. Muscarello was arrested by federal agents on December 8, 1994, for violation of federal drug statutes. At the time of his arrest, petitioner acknowledged to the arresting officers that he had a .38 caliber handgun located in the locked glove compartment of his truck. App. 8a.

2. In May 1995, pursuant to a plea agreement, petitioner pleaded guilty to conspiracy to distribute marijuana and distribution of marijuana. *See* 21 U.S.C. §§ 841(a)(1), 846. Petitioner also pleaded guilty to count 3 of the indictment against him, which charged him with "using and carrying" a firearm in relation to those crimes, pursuant to 18 U.S.C. § 924(c)(1). App. 2a, 9a, 12a. In pertinent part, the factual basis for petitioner's guilty plea, which was prepared by the government and signed by petitioner's lawyer, was the following:

> Located inside the glove compartment of the Defendant Muscarello's Ford truck was a loaded firearm which the Defendant knowing possessed in his vehicle and carried for protection in relation the above described drug trafficking offense. [*sic*]



App. 2a, 9a, 12a. It was no surprise that petitioner had a gun in his locked glove compartment: Since 1954, petitioner had held a variety of law-enforcement positions, including constable, chief of police, and — at the time of his arrest — a bailiff in the 21st Judicial District Courthouse, employed by the Tangipahoa Parish Sheriff's office. App. 3a, 10a.

3. After his guilty plea, but prior to sentencing, this Court decided *Bailey v. United States*, 116 S. Ct. 501 (1995). In *Bailey*, this Court held that the term "uses . . . a firearm" in § 924(c)(1) must be given its ordinary and natural meaning, as understood in the context of that statute — not "possession alone" or "mere possession" but "active employment of the firearm." *Id.* at 506. Looking to dictionary definitions of "use," this Court concluded that standing alone, "these various definitions of 'use' imply action and implementation." *Id.* Looking then to the context in which the term "use" appears in § 924(c)(1), the Court concluded that "use" could not be read as broadly as the government had advocated, for such a reading would "undermin[e] virtually any function for 'carry,'" the other firearm-related act that would violate § 924(c)(1). *Id.* at 507. As the Court explained:

> [A] more limited, active interpretation of "use" preserves a meaningful role for "carries" as an alternative basis for a charge. Under the interpretation we enunciate today, a firearm can be used without being carried, *e.g.*, when an offender has a gun on display during a transaction, or barters with a firearm without handling it; and a firearm can be carried without being used, *e.g.*, when an offender keeps a gun hidden in his clothing throughout a drug transaction.

*Id.*

4. In view of *Bailey*, Muscarello filed a motion to quash or dismiss count 3 of the indictment, pursuant to FED. R. CRIM. P. 12(b)(2). The government conceded that, after *Bailey*, petitioner's conviction "could no longer rest on the previously valid, alternative basis for his conviction, i.e., that he 'used' the firearm

in connection with the drug deal."[1] The government maintained, nonetheless, that petitioner had still "carried" the gun, as he had acknowledged by his guilty plea. App. 9a.

5. The district court granted petitioner's motion and dismissed count 3 of the indictment against him. App. 11a. While noting the "not very eloquen[t]" factual basis prepared by the government for petitioner's guilty plea hearing (App. 9a), the district court relied on additional facts, found in the pre-sentence report prepared by the United States Probation Office, that established that "defendant did not knowingly possess the firearm *in relation* to a drug trafficking crime," but "in furtherance of his job requirements and not for active employment in the charged transaction." App. 10a (emphasis in original).

6. The government filed a motion for reconsideration in the district court, which was denied. The government urged that petitioner, by admitting to the government's factual basis for his guilty plea, had "acquiesced in and admitted to" carrying a firearm in relation to a drug-trafficking offense. App. 12a. The district court noted that "[t]his is true, but the Court notes that this is a pre *Bailey* composition by the government and a pre *Bailey* consideration by defendant and his counsel." *Id.* The district court thus concluded that petitioner "did *carry* a firearm in the locked glove compartment of his vehicle, but not *in relation* to the commission of a drug trafficking crime." App. 13a (emphasis added).

7. The government appealed the district court's determination to the Fifth Circuit, which reversed, *per curiam*. The Fifth Circuit held that the district court had committed "two errors of law" in reaching its decision to dismiss count 3 of the indictment. App. 5a.

a. The first error identified by the court of appeals involved the question of whether *Bailey*, which dealt with the "use" prong of § 924(c)(1), had any relevance to a conviction under the

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[1] Gov't C.A. Br. at 8 n.2.



"carries a firearm" prong of that statute. Noting the district court's characterization of the factual basis for petitioner's guilty plea as "a 'pre-*Bailey* composition by the government and a pre-*Bailey* consideration by Defendant and his counsel'" (App. 5a), the court of appeals called the district court's reliance on *Bailey* "a legal non sequitur"; since "*Bailey* did not address the carrying facet of § 924(c), our prior jurisprudence on carrying remains applicable." App. 4a-5a. Following Fifth Circuit precedent,[2] the court of appeals held that petitioner's conviction could be upheld so long as the firearm was "possess[ed]" anywhere in petitioner's truck: "[T]he 'carrying' requirement of § 924(c) is met if the operator of the vehicle knowingly possesses the firearm in the vehicle during and in relation to a drug trafficking crime." *Id.* (citations and internal quotations omitted).

b. The second legal error identified by the Fifth Circuit involved not the "carry" aspect of § 924(c)(1), but the "in relation to any . . . drug trafficking crime" aspect of that statute. The district court, relying on the probation office's pre-sentence report, had held that petitioner's possession of the gun was "in furtherance of his job requirements," not "*in relation* to a drug trafficking crime." App. 10a (emphasis in original). The court of appeals held that the district court should not have relied upon petitioner's "self-serving declaration" in the pre-sentence report "regarding his subjective intent in possessing the pistol in the truck." App. 5a. According to the court of appeals, the district court erroneously "allowed the PSR to supplant the formal plea agreement." *Id.*

c. In conclusion, the Fifth Circuit noted that *Bailey* "did nothing to invalidate our pre-*Bailey* "carrying" jurisprudence, at least as to those instances of drug trafficking that involve the use of motor vehicles in which firearms are possessed." App. 5a.

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[2] *United States v. Rivas*, 85 F.3d 193, 195 (5th Cir.), *cert. denied*, 117 S. Ct. 593 (1996), and *United States v. Pineda-Ortuno*, 952 F.2d 98, 104 (5th Cir.), *cert. denied*, 504 U.S. 928 (1992).

Thus, the court concluded, "the fact that the glove compartment was locked does not prevent conviction." App. 6a.

## REASONS FOR GRANTING THE WRIT

This case presents a significant and recurring issue left open by this Court in *Bailey v. United States*, 116 S. Ct. 501 (1995): the proper construction of the phrase "carries a firearm" as used in 18 U.S.C. § 924(c)(1). In the sixteen months since *Bailey* was decided, a serious conflict has developed in the courts of appeals, which have rendered well over four dozen decisions addressing the issue. Five circuits, including the Fifth Circuit in this case, hold that the mere possession or transportation of a firearm in a motor vehicle constitutes "carrying," while three circuits hold that "carrying" a firearm under § 924(c)(1) requires that the firearm in the vehicle be "immediately accessible" to the defendant. Had petitioner been charged with violating 18 U.S.C. § 924(c)(1) in a district court within these latter three circuits, he necessarily would have been acquitted, since the gun in question was locked in a glove compartment, and thus was not "immediately accessible." Because of the serious conflict among the circuits, and because the issue is indisputably an important one, review by this Court should be granted.

### I. THE COURTS OF APPEALS ARE HOPELESSLY DIVIDED WITH RESPECT TO THE CONSTRUCTION OF 18 U.S.C. § 924(c)(1)'s "CARRIES A FIREARM" REQUIREMENT

Section 924(c)(1) of Title 18, United States Code, imposes a mandatory five-year prison term when the defendant "uses or carries a firearm" "during and in relation to any crime of violence or drug trafficking." This Court has already resolved the proper interpretation of one of the two key phrases in § 924(c)(1). In *Bailey v. United States*, this Court unanimously held that a defendant "uses" a firearm only when he "actively employ[s]" the firearm, as by brandishing or referring to it. 116 S. Ct. at 509. In *Bailey*, this Court rejected the D.C. Circuit's ruling that the defendant had "used" a firearm by transporting it in the locked trunk of his car, and remanded for consideration of



whether the defendant could nonetheless be convicted for having "carried" the gun. This case presents the Court with the opportunity to resolve the remaining key phrase of § 924(c)(1) — "carries a firearm."

"The circuits are split on the issue of whether a weapon that is aboard a moving vehicle must be immediately accessible to the defendant in order to support a 'carrying' conviction under § 924(c)(1)." *United States v. Cooke*, No. 96-1852, 1997 WL 166290, at *8 (7th Cir. April 9, 1997). The conflict among the courts of appeals was recently summarized by the First Circuit, which "agree[d] with the Fourth, Seventh and Tenth Circuits that a gun may be 'carried' in a vehicle for the purposes of § 924(c)(1) without necessarily being immediately accessible to the defendant while it is being transported." *United States v. Cleveland*, 106 F.3d 1056, 1066 (1st Cir. 1997) (citing *United States v. Mitchell*, 104 F.3d 649, 652-53 (4th Cir. 1997); *United States v. Molina*, 102 F.3d 928, 930-32 (7th Cir. 1996); *and United States v. Miller*, 84 F.3d 1244, 1256-61 (10th Cir.), *cert. denied*, 117 S. Ct. 443 (1996)). Like these courts, the Fifth Circuit in this case held that § 924(c)(1) does not require proof of "immediate accessibility." App. 4a-5a.

On the other hand, the court in *Cleveland* "recognize[d] that the Second, Sixth and Ninth Circuits have taken a contrary position, requiring that the firearms be immediately accessible." 106 F.3d at 1068 (citing *United States v. Staples*, 85 F.3d 461, 464 (9th Cir.), *cert. denied*, 117 S. Ct. 318 (1996); *United States v. Giraldo*, 80 F.3d 667, 677-78 (2d Cir.), *cert. denied*, 117 S. Ct. 135 (1996); *and United States v. Riascos-Suarez*, 73 F.3d 616, 623 (6th Cir.), *cert. denied*, 117 S. Ct. 136 (1996)). *See also United States v. Nelson*, No. 96-3103, 1997 WL 149200, at *3 (8th Cir. April 2, 1997) ("We will assume, without deciding,

that ready availability of the firearm is required for a 'carry' conviction in this Circuit.").[3]

This conflict over the meaning of "carry" results in precisely the inconsistent jurisprudence that this Court's certiorari power is designed to address. Indeed, an individual's exposure to criminal prosecution under § 924(c)(1) (and the accompanying five-year prison sentence) will in many instances depend entirely on where the case arises. Nowhere is this more apparent than in the present case. It is undisputed, as both the district court and court of appeals noted, that petitioner was convicted for possessing a firearm in the glove compartment of his truck, which by all indications was locked. App. 2a, 8a. According to the court of appeals in this case, however, it was legally irrelevant whether the firearm was readily accessible to petitioner, for the Fifth Circuit holds that when "the defendant knowingly possesses a firearm in a motor vehicle and uses the vehicle during the commission of the underlying crime, then *as a matter of law* the firearm is carried during a drug-trafficking offense for purposes of § 924(c)." App. 6a (emphasis added). Under that approach, "the fact that the glove compartment was locked does not prevent conviction." App. 6a.

In the three circuits that construe "carry" to require immediate accessibility of the firearm, the judgment below would unquestionably have been different. Under the Second Circuit's approach, exemplified by *United States v. Cruz-Rojas*, 101 F.3d 283 (2d Cir. 1996), the court of appeals would have, at the very least, remanded for an evidentiary determination of whether the firearm was immediately accessible to petitioner. In *Cruz-Rojas*, the two defendants pleaded guilty to federal drug crimes, and to "aiding and abetting each other in knowingly using and carrying a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1) and 18 U.S.C. § 2." *Id.* at 283. Just as in

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[3] For other decisions acknowledging the conflict, see, *e.g.*, *United States v. Mitchell*, 104 F.3d 649, 653 (4th Cir. 1997), and *United States v. Molina*, 102 F.3d 928, 930 (7th Cir. 1996).



this case, the defendants in *Cruz-Rojas* pleaded guilty to "knowingly us[ing] and carry[ing] a firearm." *Id.* at 284. Recognizing that in light of *Bailey*, "a pivotal aspect of the applicable law changed after the defendants entered their pleas of guilt," *id.* at 285, the Second Circuit concluded that the defendants' guilty pleas could not stand "insofar as [they were] based on *use* of a firearm." *Id.* at 284 (emphasis in original). Turning to the possibility that their guilty pleas could be sustained under the "carry" prong of § 924(c)(1), the Second Circuit concluded that "the government's recital of what it was prepared to prove offered no substantial basis for an inference that, at the time [defendants] were apprehended, the gun was within the reach of [either defendant]." *Id.* at 286. The firearm, according to the factual basis for the guilty pleas, was located in a compartment under the car's dashboard. The Second Circuit held that the record provided it "with no information on whether the gun's positioning under the dashboard in fact provided easy access either to the driver or to the passenger." *Id.* at 286. The court therefore remanded for "an evidentiary hearing on whether the gun found under the dashboard was accessible." *Id.*

Another Second Circuit decision, *United States v. Giraldo*, 80 F.3d 667, makes the conflict even more manifest. In *Giraldo*, the gun was located in a secret compartment in an automobile that contained several passengers, each of whom was convicted for "carrying" a firearm in connection with a drug-trafficking crime under § 924(c)(1). *Id.* at 672. On appeal after a jury trial, the Second Circuit carefully distinguished between the individual defendants based on whether they had immediate access to the firearm; the court affirmed the § 924(c)(1) convictions only as to those defendants that did in fact have such immediate access, and reversed as to the remaining defendants. *Id.* at 676-77. Under the Fifth Circuit's broad-brush approach, all of the convictions in *Giraldo* would have been affirmed.

Similarly, in *United States v. Malcuit*, 104 F.3d 880 (6th Cir. 1997), the defendant was convicted for "carrying" a gun in violation of § 924(c)(1), based on the presence of an unloaded firearm located in a bag in the back seat of the car. The Sixth

Circuit held that the record evidence regarding the proximity of the defendant to the firearm was "not particularized enough for this court to determine whether the firearm would have been 'within effortless reach.'" *Id.* at 885-86. It therefore remanded the case to allow the district court to evaluate that issue. *Id.*

In direct conflict with these rulings are the numerous cases that apply the standard utilized by the Fifth Circuit in this case, and affirm convictions under § 924(c)(1), based on the defendant's mere transportation or possession of a firearm.[4] *See also United States v. Moore*, No. 95-5586, 107 F.3d 868, 1997 WL 71707 (4th Cir. Feb. 20, 1997) (*per curiam*) (affirming conviction without even mentioning where in vehicle firearm was); *United States v. Ruth*, 100 F.3d 111 (10th Cir. 1996) (same).

The present case illustrates this conflict. Even putting aside the district court's reliance on the pre-sentence report,[5] the plea colloquy itself still would not establish "a factual basis for the plea" (FED. R. CRIM. P. 11(f)) of "carrying a firearm," under the "immediate accessibility" approach that governs in the Second, Sixth, and Ninth Circuits. Under that approach, the result here should have been either affirmance of the district court's dismissal of count 3 of the indictment, *compare Giraldo*, 80 F.3d at 676-77, or at the very least, as in *Cruz-Rojas*, a remand for "an

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[4] *See, e.g., United States v. Sherman*, 106 F.3d 394 (4th Cir. 1997) *(per curiam)* (affirming § 924(c)(1) "carry" conviction where, as here, the gun was located in a glove compartment); *United States v. Cleveland*, 106 F.3d 1056 (1st Cir. 1997) (affirming conviction where the firearm was located in the vehicle's trunk — obviously not "immediately accessible"). The First and Seventh Circuits have reached the same result when the firearm was in a closed secret compartment. *United States v. Molina*, 102 F.3d 928; *United States v. Ramirez-Ferrer*, 82 F.3d 1149 (1st Cir.), *cert. denied*, 117 S. Ct. 405 (1996).

[5] The district court's reliance on the pre-sentence report went solely to the "in relation to any crime of . . . drug trafficking" requirement of § 924(c)(1), and not to the "carrying" requirement of that statute that is at issue here. App. 10a.



evidentiary hearing on whether the gun . . . was accessible to . . . the defendan[t]." 101 F.3d at 286.[6] The Fifth Circuit here was able to conclude that there was an adequate factual basis for petitioner's guilty plea only by holding that a firearm is "carried" for purposes of § 924(c)(1) whenever it is possessed within a motor vehicle, even if the firearm is locked away in the glove compartment. App. 4a-5a.

## II. THE QUESTION PRESENTED BY THIS CASE IS IMPORTANT AND RECURRING

As the Solicitor General recently told this Court, "18 U.S.C. § 924(c) is an important and widely used statute." Petition for Certiorari, *United States v. Gonzales*, No. 95-1605, at 7. In *Bailey*, this Court similarly acknowledged that "§ 924(c)(1) has been the source of much perplexity in the courts." 116 S. Ct. at 505. Its broad applicability — and widespread use by the government — can be seen in the sheer number of decisions, post-*Bailey*, to have addressed the question presented here.[7]

So, too, the necessity for this Court's review is confirmed by the divergence of judicial views regarding the interpretation of § 924(c)(1)'s "carrying" requirement. As the Seventh Circuit has recently noted, "[t]he term 'carries' as used in § 924(c)(1) is not one that has yielded to precise definition. Over seven years ago,

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[6] If an "immediate accessibility" standard were to prevail, petitioner's conviction under § 924(c)(1)'s "carry" prong might then be reversed by this Court as a matter of law, since the government has never disputed that the glove compartment of petitioner's truck was locked. Alternatively, the case might be remanded to the district court for an evidentiary hearing to determine the accessibility of the gun to petitioner.

[7] Since this Court's December 1995 decision in *Bailey v. United States*, most of the circuits have decided at least one if not several cases involving the construction of § 924(c)(1)'s "carry" requirement. A list of such decisions is presented at pages 14a-17a of the appendix to this petition.

a panel of this Court observed that 'defining the scope of the statutory term "carries" . . . has not been an easy task for our colleagues in other circuits.' Unfortunately, the passage of time has not brought much clarity to the issue." *United States v. Cooke*, 1997 WL 166290, at *5 (quoting *United States v. Edun*, 890 F.2d 983, 988 (7th Cir. 1989)). As outlined above, the courts of appeals are hopelessly divided, and there is thus no need for further percolation of the issue in the lower courts.

Finally, the proper construction of § 924(c)(1) is obviously important to individual defendants such as petitioner. Petitioner, who is currently 71 years old, faced a guidelines-computed sentence of 6 to 12 months' imprisonment for the two substantive drug violations to which he pleaded guilty. *See* Pre-Sentence Report at 10 (June 14, 1996). By contrast, the penalty for violation of § 924(c)(1) is at least five years' imprisonment. It is critical that § 924(c)(1) be applied uniformly throughout the Nation.

## III. THE DECISION BELOW WAS CLEARLY WRONG

The Fifth Circuit, relying on what it called its "pre-*Bailey* 'carrying' jurisprudence" (App. 5a), held that "[w]hen . . . the defendant knowingly possesses a firearm in a motor vehicle and uses the vehicle during the commission of the underlying crime, then *as a matter of law* the firearm is carried during a drug-trafficking offense for purpose of § 924(c)." App. 6a (emphasis added). This sweeping approach, under which mere possession or transportation equals "carrying," was manifestly erroneous.

Three Justices of this Court — Justices Scalia, Stevens, and Souter — have noted that "carrying a firearm" in the context of § 924(c)(1) "means *carrying it in such manner as to be ready for use as a weapon*." *Smith v. United States*, 508 U.S. 223, 245-46 (1993) (Scalia, J., dissenting) (emphasis added). This construction of § 924(c)(1)'s "carry" requirement would seem to foreclose a conviction where a firearm is locked away in a glove compartment. Similarly, then-Chief Judge Breyer has previously stated that "the ordinary meanings of the words 'use' *and 'carry'* . . . connote *activity beyond simple possession*." *United States v.*



*McFadden*, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting) (emphasis added). Justice Breyer's view of the proper meaning of "carry," which was cited by this Court in *Bailey*, 116 S. Ct. at 506, is also at odds with the "knowingly possesses" standard adopted by the Fifth Circuit and applied in this case. App. 4a.

Similarly, this Court's unanimous decision in *Bailey* casts serious doubt upon the construction adopted by the Fifth Circuit in this case. The term "carries a firearm," like the term "uses a firearm," "must be given its 'ordinary or natural' meaning," construed in light of "its placement and purpose in the statutory scheme." *Bailey*, 116 S. Ct. at 506 (quoting *Smith*, 508 U.S. at 228). In *Bailey*, even though the question of what constitutes "carrying a firearm" was not strictly before this Court, the statutory interrelationship between "use" and "carry" occasioned this discussion:

> Under the interpretation we enunciate today, a firearm can be used without being carried, *e.g.*, when an offender has a gun on display during a transaction, or barters with a firearm *without handling it*; and a firearm can be carried without being used, *e.g.*, when an offender keeps a gun hidden in his clothing throughout a drug transaction.

116 S. Ct. at 507 (emphasis added).

These examples suggest that the court of appeals' interpretation of "carries a firearm" was far too broad. Certainly, this Court in *Bailey* was applying an "ordinary or natural" meaning to the term when it explained that an offender who displays a firearm "without handling it" does not carry the firearm. Justices Scalia, Stevens, and Souter were similarly utilizing the ordinary meaning of "carrying a firearm," "in the context" of § 924(c)(1), when they concluded that it "means carrying it in such manner as to be ready for use as a weapon." *Smith*, 508 U.S. at 245-46. But petitioner's possession of a firearm in his locked glove compartment satisfies neither of these ordinary understandings of "carrying a firearm" — petitioner neither "handled" the firearm nor

possessed it "in such manner as to be ready for use as a weapon."[8]

Indeed, dictionary definitions suggest that to "carry" a firearm means something much more limited than mere possession in a vehicle — namely, to "have the firearm on one's person." Thus, to "carry arms or weapons" means "[t]o wear, bear, or carry them *upon the person or in the clothing or in a pocket,* for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person." BLACK'S LAW DICTIONARY 194 (5th ed. 1979) (emphasis added). *See also* II THE OXFORD ENGLISH DICTIONARY 921 (2d ed. 1989) (when the object of "carry" is a weapon, such as "to carry arms," "carry" means "[t]o bear, wear, hold up, or sustain, as one moves about; habitually to bear about with one (e.g. any ornament, ensign, personal adjunct; also a name or other distinction)"). Finally, any possible ambiguity in the term "carry" would have to be resolved in petitioner's favor in light of the rule of lenity, which "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States v. Lanier,* 117 S. Ct. 1219, 1225 (1997). *See also Smith,* 508 U.S. at 246-47 (Scalia, J., dissenting); *Adamo Wrecking Co. v. United States,* 434 U.S. 275, 284-85 (1978); *United States v. Bass,* 404 U.S. 336, 348 (1971).

In short, the decision below is erroneous and should be reversed.

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[8] Likewise, the Court's example in *Bailey* of what *does* constitute "carrying" a firearm — "keep[ing] a gun hidden in his clothing" — suggests a statutory construction requiring either "handling" (*Bailey v. United States,* 116 S. Ct. 501, 507 (1995)) or immediate accessibility, so "as to be ready for use as a weapon." *Smith v. United States,* 508 U.S. 223, 246 (1993) (Scalia, J., dissenting).



## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 18, 1997

# APPENDIX

**UNITED STATES COURT OF APPEALS**

**FIFTH CIRCUIT.**

**UNITED STATES of America, Plaintiff-Appellant,**

**v.**

**Frank J. MUSCARELLO, Defendant-Appellee.**

**No. 96-30591**
**Summary Calendar.**

**Feb. 13, 1997.**

Stephen A. Higginson, Asst. U.S. Atty, New Orleans, LA, for plaintiff-appellant.

Ron S. Macaluso, John Garrison Jordan, Seale, Macaluso, Daigle & Ross, Hammond, LA, for defendant-appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before HIGGINBOTHAM, WIENER AND BENAVIDES, Circuit Judges.

PER CURIAM:

In this direct criminal appeal, the government asks us to reverse the district court's dismissal of one count in a multi-count indictment to which Defendant-Appellee Frank J. Muscarello had pled guilty. Count Three charged Muscarello with knowingly using and carrying a firearm in relation to a drug-trafficking offense, in violation of 18 U.S.C. § 924(c)(1). Based on the presentence report (PSR), the court dismissed Count Three, to which Muscarello had already pled guilty and on which he had

already been convicted. Agreeing with the government that the district court erred in dismissing the firearms count, we reverse and remand for further proceedings consistent with this opinion.

## I

## FACTS AND PROCEEDINGS

Pursuant to a plea agreement, Muscarello pleaded guilty in May 1995 to drug charges and to "using and carrying" a firearm in relation to those crimes. The factual basis for the guilty plea, which was signed for approval by Muscarello's attorney, established that "[l]ocated inside the glove compartment of the Defendant Muscarello's Ford truck was a loaded firearm which the Defendant knowing [sic] possessed in his vehicle and *carried* for protection *in relation* to the above described drug trafficking offense" (emphasis added). Muscarello did not object to the factual basis supporting his convictions.

After Muscarello was thus convicted but prior to his being sentenced, the United States Supreme Court rendered its decision in *Bailey v. United States*,[1] significantly narrowing the "use" facet of § 924(c) (but not addressing the "carrying" facet). This prompted Muscarello to file a motion under Fed.R.Crim.P. 12(b)(2) to quash or dismiss the firearm count.[2] After holding a hearing on Muscarello's motion, the district court granted it, dismissing and quashing Count Three. In so doing, the district court chose no longer to credit the factual basis presented by the government and concurred in by Muscarello, but instead to switch its reliance exclusively to the following two paragraphs from Muscarello's post-conviction PSR:

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[1] —U.S.—, 116 S. Ct. 501, 133 L.Ed. 2d 472 (1995).

[2] Notwithstanding Muscarello's argument to the contrary, it is of no moment that the indictment charged that Muscarello carried "and" used a firearm rather than that he carried "or" used a firearm. *See United States v. Pigrum*, 922 F.2d 249, 253 (5th Cir.), *cert. denied*, 500 U.S. 936, 111 S. Ct. 2064, 114 L.Ed.2d 468 (1991) (a disjunctive statute may be pleaded conjunctively and proved disjunctively).



> As to the weapon, Muscarello does not deny his possession of the pistol. The pistol was in the glove compartment of his truck where it had been for a long period of time. He denies any conscious decision to carry the gun in relation to the marijuana sale, and stated that he carried in relation to his job with the Tangipahoa Parish Sheriff's office as balif[sic] at the courthouse in Amite.
>
> ....
>
> In 1954, [Muscarello] became constable of the 6th Ward of Tangipahoa Parish, a mostly rural area that included the farming community of Tickfaw. He held this position until 1958. In 1957 Tickfaw was incorporated, and Muscarello was elected Chief of Police in the town. He maintained both positions until his term as constable expired in 1958. Muscarello was the Chief of Police in Tickfaw until his retirement in 1987. From 1987 until his arrest on December 8, 1994, he was employed with the Tangipahoa Parish Sheriff's office, working as a bailiff in the 21st Judicial District Courthouse, Amite, Louisiana.

The court stated that "[t]he equities herein favor [Muscarello]" and concluded that Muscarello "did not knowingly possess *in relation* to a drug-trafficking crime," but that "[t]o the contrary, defendant, his employment background considered, knowingly possessed in the glove compartment of his vehicle in furtherance of his job requirements and not for active employment in the charged transaction."

The government moved for reconsideration but the district court d nied that motion despite its acknowledgment that Muscarello, "in the guilty plea colloquy, [had] acquiesced in and admitted to the government's factual basis[.]" The court went on to note that "this [was] a pre-*Bailey* composition by the government and a pre-*Bailey* consideration by defendant and his counsel." The court then quoted the foregoing paragraphs from Muscarello's PSR again, and repeated the conclusion that Muscarello "did *carry* a firearm in a locked glove compartment of his vehicle, but not *in relation* to the commission of a drug-

trafficking crime." The case is before us for review by virtue of the government's timely filing of a notice of appeal.[3]

## II

## ANALYSIS

To support a conviction under § 924(c), the evidence must prove that the Defendant (1) used or carried a firearm, (2) during and in relation to a drug-trafficking offense.[4] The government concedes that, after *Bailey*, the evidence in the instant case will not support a conviction for use under § 924(c). The government nevertheless contends that, as *Bailey* did not address the *carrying* facet of § 924(c), our prior jurisprudence on carrying remains applicable, and the factual basis is more than sufficient to support Muscarello's conviction for carrying the firearm. We agree. Our recent decision in *United States v. Rivas* recognizes that *Bailey* does not alter our prior precedent analyzing the "carrying" facet of § 924(c), at least when the gun is possessed in a motor vehicle.[5] Consequently, "the 'carrying' requirement of § 924(c) is met if the operator of the vehicle knowingly possesses the firearm in the vehicle during and in relation to a drug trafficking

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[3] We have jurisdiction under 18 U.S.C. § 3731, which permits the government to appeal from "an order of the district court dismissing an indictment ... as to any one or more counts[.]" *See United States v. Mann*, 61 F.3d 326, 330-31 (5th Cir.), *cert. denied*, —U.S.— , 116 S. Ct. 434, 133 L.Ed.2d 349 (1995). Section 3731 gives the government 30 days in which to appeal, and here the government's motion to reconsider was filed within the 30-day period, extending the time in which to appeal and thus recommencing the running of the 30-day period on the date the government's motion was denied. *United States v. Brewer*, 60 F.3d 1142-1143 (5th Cir. 1995).

[4] 18 U.S.C. § 924(c).

[5] 85 F.3d 193, 195 (5th Cir.), *cert. denied*, —U.S.—, 117 S. Ct. 593, 136 L.Ed.2d 521 (1996).



crime."[6] Although none question that (1) the possession element of the carrying facet of § 924(c) was met by the uncontested fact that Muscarello knowingly possessed a loaded piston in the glove compartment of his truck, or (2) the gun was thus possessed "during" the commission of the drug-trafficking crime, the district court determined on the basis of the PSR that the "in relation to" element was not present. We conclude that the district court clearly erred in this determination, and did so as a result of two errors of law. First, the district court erred in discrediting and disregarding the factual basis concurred in by Muscarello, by characterizing it as a "pre-*Bailey* composition by the government and a pre-*Bailey* consideration by Defendant and his counsel." Although that might be a valid legal basis for disregarding the factual basis as to the use facet of § 924(c), it is a legal non sequitur when the carrying facet is under scrutiny. It follows that the court's disregard of the factual basis was legal error. Second, the court erred in relying on Muscarello's post-conviction self-serving declaration to the probation officer, recounted in the PSR, regarding his subjective intent in possessing the pistol in the truck that he used in facilitating his illicit drug trafficking. Under the circumstances of this case, the court should not have allowed the PSR to supplant the formal plea agreement, given the defendant's knowing and voluntary concurrence, and that of his counsel, in the clear and unambiguous factual basis for that plea.

## III

## CONCLUSION

The Supreme Court decision in *Bailey* addressed the *use* facet of § 924(c) but did not address the *carrying* facet. Although Bailey indirectly heightened the focus on the *carrying* facet of § 924(c) by narrowing the *use* facet, it did nothing to invalidate

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[6] *Id.* (quoting *United States v. Pineda-Ortuno*, 952 F.2d 98, 104 (5th Cir.), *cert. denied*, 504 U.S. 928, 112 S. Ct. 1990, 118 L.Ed.2d 587 (1992)).

our pre-*Bailey* "carrying" jurisprudence, at least as to those instances of drug trafficking that involve the use of motor vehicles in which firearms are possessed. We recognized in *United States v. Pineda-Ortuno*[7] that "[w]hen a vehicle is used, 'carrying' takes on a different meaning from carrying on a person because the means of carrying is the vehicle itself." Thus, for example, the fact that the glove compartment was locked does not prevent conviction.[8] This is not to say, however, that every time a gun is knowingly possessed in a vehicle and the vehicle is used during and in relation to the commission of a drug-trafficking crime, the firearm is, as a *per se* matter of law, carried *in relation to* a drug-trafficking offense for purposes of § 924(c). Albeit a rarity, it is at least conceivable for such a vehicle-contained gun to be *carried* "during" but not necessarily "in relation to" the offense.

When, as here, the defendant knowingly possesses a firearm in a motor vehicle and uses the vehicle during the commission of the underlying crime, then as a mater of law the firearm is carried during a drug-trafficking offense for purposes of § 924(c). It matters not that the government confected the factual basis in the instant case before the decision in *Bailey*, or that Muscarello's knowing and voluntarily agreement with the accuracy of the factual basis predated *Bailey*. Neither does it matter that, according to the PSR, Muscarello subjectively intended to possess the firearm in connection with his bailiffing job and not in connection with his drug-trafficking crime when he has already knowingly and voluntarily signed on to a plea agreement with a factual basis that expressly includes the "in relation to" element.

The district court erred both in disregarding the factual basis for Muscarello's guilty plea and in relying on the content of the PSR regarding Muscarello's subjective intention. As this reliance led the district court to err in dismissing Count Three of the

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[7] 952 F.2d 98 (5th Cir.), *cert. denied*, 504 U.S. 928, 112 S. Ct. 1990, 118 L.Ed.2d 587 (1992).

[8] *Id.* at 104.



indictment, we (1) reverse that dismissal, (2) reinstate Count Three of the indictment and Muscarello's conviction thereon pursuant to his guilty plea, (3) vacate the sentence imposed to the extent that Muscarello's guilt on the firearms charge was not considered in calculating the sentence, and (4) remand the case to the district court for reimposition of Muscarello's conviction on Count Three and for resentencing. In so doing, we observe that what constitutes "carrying" under § 924(c) when the firearm is possessed in the motor vehicle differs substantially from what constitutes carrying a firearm in a non-vehicle situation. Thus our pronouncements today regarding carrying a firearm should not be applied in a non-vehicle situation without closely scrutinizing the effects of this distinction and questioning charily whether our vehicle case jurisprudence is properly applicable to a non-vehicle case, and vice versa.

DISMISSAL REVERSED; DISMISSED COUNT AND CONVICTION THEREON REINSTATED; SENTENCE VACATED; and CASE REMANDED for resentencing.

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF LOUISIANA**

**UNITED STATES OF AMERICA** **CRIMINAL ACTION**
**versus** **NO. 95-2**
**FRANK J. MUSCARELJ O** **SECTION: "E"**

**RULING ON**
**DEFENDANT'S MOTION TO QUASH**
**AND/OR DISMISS COUNT 3 OF THE INDICTMENT**

Defendant, Frank J. Muscarello, was named in a three count indictment wherein Count 1 charged him with conspiracy to distribute marijuana, Count 2 with distribution of marijuana and Count 3 with possessing a .38 caliber revolver during a drug trafficking crime. On May 25, 1995 after entering into a plea agreement he pled guilty to all three counts. Sentence has not yet been imposed. Now, in view of the December, 1995 Supreme Court decision in *Bailey v. United States*, 116 S. Ct. 501, he moves to quash and/or dismiss Count 3. The government opposes the motion.

The facts are undisputed in this case. The defendant arranged and coordinated the delivery of approximately eight pounds of marijuana to an undercover Drug Enforcement Agency Special Agent and made these arrangements with the assistance of an undercover cooperating individual. At the time of the delivery of the marijuana and receipt of payment of delivery by the defendant, a .38 caliber weapon was in the locked glove compartment of his truck. At the time of his arrest he acknowledged his possession of the weapon and it was seized by the arresting officers. He told the arresting officers that he had the weapon in the glove compartment. At no time during the marijuana transactions did he show the weapon to the officers, mention that he had a weapon, brandish the weapon, or make any threats against the officers.

The question presented is whether Count 3 properly charges defendant with using or carrying a weapon as proscribed by 18



U.S.C. §924(c). The government apparently concedes that defendant did not "use" the weapon, but argues that defendant's reliance on *Bailey* as the basis to dismiss Count 3 is misplaced since the Supreme Court in *Bailey* explicitly did not address criminal liability under the "carry" prong of 18 U.S.C. §924(c). It further argues that under Fifth Circuit law, defendant was carrying the loaded firearm, as charged, when he drove his truck to the location of the illegal drug deal to secure payment for the delivery and ensure that the drug was delivered to the buyer. *United States v. Pineda-Ortuno*, 952 F. 2d 98 (5th Cir. 1992), *cert. denied*, 112 S. Ct. 1990 (1992). Under *Pineda-Ortuno*, a conviction under the "carry" prong of §924(c) (1) is supported by the evidence if (1) the firearm was in a motor vehicle; (2) the vehicle was operated by the defendant and (3) the operator of the vehicle knowingly possessed the firearm during and in relation to a drug-trafficking crime. 924 F. 2d at 104.

The government additionally argues that analyzing *Bailey's* interpretation of §924(c) as requiring a showing of some specific utility of the weapon in relation to the drug trafficking crime, an additional element which might be necessary to sustain the conviction is that the firearm had a role of some type in the offense, i.e. was not possessed incidentally, but for a purpose. The government further argues that in this case the undisputed purpose, acknowledged by the defendant in his factual basis, is that he carried the weapon in his vehicle during the commission of the drug trafficking crime for his protection.

The factual basis prepared, not very eloquently, by the government for use at the guilty plea hearing, quoted directly in part, states:

> Located inside the glove compartment of the defendant Muscarello's Ford truck was a loaded firearm which the defendant knowling possessed in his vehicle and carried for protection in relation the above described drug trafficking offense.

On the other hand, the Court, as has all counsel, has been provided with the formal presentence investigation report prepared by the U.S. Probation office after its review and analysis of the overall matter. In paragraph 16 of the report it is stated:

> As to the weapon, Muscarello does not deny his possession of the pistol. The pistol was in the glove compartment of his truck where it had been for a long period of time. He denies any conscious decision to carry the gun in relation to the marijuana sale, and stated that he carried it in relation to his job with the Tangipahoa Parish Sheriff's Office as a balif at the Courthouse in Amite.

The report further states in paragraph 42:

> In 1954, he become constable of the 6th Ward in Tangipahoa Parish, a mostly rural area that included the farming community of Tickfaw. He held this position until 1958. In 1957 Tickfaw was incorporated, and Muscarello was elected Chief of Police in the town. He maintained both positions until his term as constable expired in 1958. Muscarello was the Chief of Police in Tickfaw until his retirement in 1987. From 1987 until his arrest on December 8, 1994, he was employed with the Tangipahoa Parish Sheriff's office, working as a baliff in the 21st Judicial District Courthouse, Amite, Louisiana.

Thus, considering the motion, the memoranda submitted by counsel, the record and the oral argument presented, the Court is of the opinion that the equities herein favor defendant. The Court rejects the government's *Pineda-Ortuno* argument, being of the opinion as respects the third criterion thereof, that defendant did not knowingly possess the firearm *in relation* to a drug-trafficking crime. To the contrary, defendant, his employment background considered, knowingly possessed the firearm in the glove compartment of his vehicle in furtherance of his job requirements and not for active employment in the charged transaction. Accordingly,



IT IS ORDERED that defendant's motion be GRANTED and that Count 3 of the indictment against him be QUASHED and DISMISSED.

New Orleans, Louisiana, April 10, 1996.

/s/ Marcel Livaudais, Jr.

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MARCEL LIVAUDAIS, JR.
United States District Judge

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF LOUISIANA**

**UNITED STATES OF AMERICA** **CRIMINAL ACTION**
**versus** **NO. 95-2**
**FRANK J. MUSCARELLO** **SECTION: "E"**

**RULING ON GOVERNMENT'S MOTION REQUESTING RECONSIDERATION OF "QUASH AND/OR DISMISSAL" ORDER**

The government moves the Court to reconsider its April 11, 1996 ruling "quashing/dismissing" Count 3 of the indictment against Frank J. Muscarello. For the following additional reasons the Court declines to do so.

Count 3 charges that defendant "did knowingly use and carry a firearm. . . . during and in relation to the commission of a drug trafficking crime. . ." We are concerned here only with the 'carry' prong, not the 'use' prong, of the charge.

The government strongly urges the court to reconsider its earlier ruling since defendant in the guilty plea colloquy, acquiesced in and admitted to the government's factual basis, particularly these words:

> Located inside the glove compartment of the defendant Muscarello's Ford truck was a loaded firearm which the defendant knowingly possessed in his vehicle and carried for protection in relation the above described drug trafficking offense.

This is true, but the Court notes that this is a pre *Bailey* composition by the government and a pre *Bailey* consideration by defendant and his counsel.

The Court further notes that its reference in its earlier ruling to paragraphs 16 and 42 of the presentence investigation report were not objected to by the government after having had an opportunity to do so. In paragraph 16 of the report it is stated:



> As to the weapon, Muscarello does not deny his possession of the pistol. The pistol was in the glove compartment of his truck where it had been for a long period of time. He denies any conscious decision to carry the gun in relation to the marijuana sale, and stated that he carried it in relation to his job with Tangipahoa Parish Sheriff's Office as a bailiff at the Courthouse in Amite.

The report further states in paragraph 42:

> In 1954, he became constable of the 6th Ward in Tangipahoa Parish, a mostly rural area that included the farming community of Tickfaw. He held this position until 1958. In 1957 Tickfaw was incorporated, and Muscarello was elected Chief of Police in the town. He maintained both positions until his term as constable expired in 1958. Muscarello was the Chief of Police in Tickfaw until his retirement in 1987. Form 1987 until his arrest on December 8, 1994, he was employed with the Tangipahoa Parish Sheriff' office working as a bailiff in the 21st Judicial District Courthouse, Amite, Louisiana.

All of this persuaded the Court to rule as it did in its earlier ruling and persuades the Court, considering the entirety of that ruling, to deny the government's request for reconsideration. Defendant did *carry* a firearm in the located glove compartment of his vehicle, but not *in relation* to the commission of a drug trafficking crime. Accordingly,

IT IS ORDERED that the government's motion for reconsideration be DENIED.

New Orleans, Louisiana, May 6, 1996.

/s/ Marcel Livaudais, Jr.

MARCEL LIVAUDAIS, JR.
United States District Judge

## POST-*BAILEY* CASES ON § 924(c)(1)'S "CARRY" REQUIREMENT AND IMMEDIATE ACCESSIBILITY

**Parentheticals indicate location of the firearm**

**Immediate accessibility required: 2d, 6th, 9th Circuits**

*United States v. Irvin*, No. 95-1823, 107 F.3d 12, 1997 WL 49130 (6th Cir. Feb. 5, 1997) (*per curiam*) (under seat)

*Wyley v. United States*, No. 95-3784, 107 F.3d 12, 1997 WL 49073 (6th Cir. Feb. 3, 1997) (*per curiam*) (easily accessible in back of car)

*United States v. Malcuit*, 104 F.3d 880, (6th Cir. Jan. 21, 1997) (unloaded in back seat)

*United States v. Davis*, No. 95-50514, 106 F.3d 409, 1997 WL 14429 (9th Cir. Jan. 10, 1997) (easily accessible under seat or on floorboard)

*Russel v. United States*, 103 F.3d 130 (6th Cir. 1996) (under driver's seat)

*United States v. Taylor*, 102 F.3d 767 (6th Cir. 1996) (*per curiam*) (under seat)

*United States v. Myers*, 102 F.3d 227 (6th Cir. 1996) (under front seat)

*United States v. Cruz-Rojas*, 101 F.3d 283 (2d Cir. 1996) (in dash)

*United States v. Lopez*, 100 F.3d 98 (9th Cir. 1996) (in purse on floorboard)

*United States v. Steinberg*, 99 F.3d 1486 (9th Cir. 1996) (under driver and passenger seats)

*Dempsey v. United States*, No. 96-3335, 103 F.3d 129, 1996 WL 683588 (6th Cir. Nov. 22, 1996) (on defendant's person), *cert. denied*, 117 S. Ct. 1120 (1997)

*United States v. Collins*, No. 96-1203, 104 F.3d 354, 1996 WL 658733 (2d Cir. Nov. 12, 1996) (loose in passenger compartment)

*United States v. Olds*, No. 94-6286, 98 F.3d 1343, 1996 WL 557768 (6th Cir. Sept. 30, 1996) (*per curiam*) (unloaded in the rear seat)



*United States v. Jackson*, No. 95-5949, 97 F.3d 1453, 1996 WL 536418 (6th Cir. Sept. 19, 1996) (*per curiam*) (in trunk)

*United States v. Mua*, No. 95-30202, 97 F.3d 1462, 1996 WL 534054 (9th Cir. Sept. 19, 1996) (on passenger side in open bag), *cert. denied*, 117 S. Ct. 695 (1997)

*United States v. Loaiza-Diaz*, 96 F.3d 1335 (9th Cir. 1996) (under passenger seat)

*United States v. Range*, 94 F.3d 614 (11th Cir. 1996) (under floormat)

*United States v. Robinson*, No. 95-5171, 95 F.3d 1153, 1996 WL 490379 (6th Cir. Aug. 27, 1996) (*per curiam*) (under driver's seat), *cert denied*, 117 S. Ct. 716 (1997)

*United States v. Willett*, 90 F.3d 404 (9th Cir. 1996) (defendant admitted gun was easily accessible)

*United States v. Staples*, 85 F.3d 461 (9th Cir.) (in glove compartment), *cert. denied*, 117 S. Ct. 318 (1996)

*United States v. Pimentel*, 83 F.3d 55 (2d Cir. 1996) (in accessible secret compartment)

*United States v. Baena-Gabriel*, No. 94-50056, 91 F.3d 155, 1996 WL 368142 (9th Cir. June 28, 1996) (on passenger seat)

*United States v. Matthews*, No. 94-50630, 87 F.3d 1324, 1996 WL 341423 (9th Cir. June 19, 1996) (on passenger seat)

*United States v. Gray*, No. 95-1197, 87 F.3d 1315, 1996 WL 294455 (6th Cir. June 3, 1996) (on seat)

*United States v. Ellis*, No. 95-10064, 86 F.3d 1164, 1996 WL 281643 (9th Cir. May 28, 1996) (on floorboard under driver's seat), *cert. denied*, 117 S. Ct. 271 (1996)

*United States v. Giraldo*, 80 F.3d 667 (2d Cir.) (in secret compartment accessible to some but not others), *cert. denied*, 117 S. Ct. 135 (1996)

*United States v. Farris*, 77 F.3d 391 (11th Cir.) (in glove compartment), *cert. denied*, 117 S. Ct. 241 (1996)

*United States v. Riascos-Suarez*, 73 F.3d 616, 623 (6th Cir.) (on driver's side of console), *cert. denied*, 117 S. Ct. 136 (1996)

**Immediate accessibility not required: 1st, 4th, 5th, 7th, and 10th Circuits**

*United States v. Cooke*, No. 96-1852, 1997 WL 166290 (7th Cir. April 9, 1997) (laying in bed of pickup truck)

*United States v. Carraway*, No. 94-1938, 1997 WL 93779 (7th Cir. Mar. 5, 1997) (easily accessible)

*United States v. Moore*, No. 95-5586, 107 F.3d 868, 1997 WL 71707 (4th Cir. Feb. 20, 1997) (*per curiam*) (somewhere in truck)

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(2)

Supreme Court, U.S.
FILED
JUN 18 1997
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No. 96-1654

# In the Supreme Court of the United States

OCTOBER TERM, 1996

FRANK J. MUSCARELLO, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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19 pp

## QUESTION PRESENTED

Whether a firearm that is transported in a vehicle must also be within the defendant's immediate reach in order to be "carried" within the meaning of 18 U.S.C. 924(c).

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# In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1654

FRANK J. MUSCARELLO, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 106 F.3d 636. The opinions of the district court (Pet. App. 8a-11a, 12a-13a) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on February 13, 1997. The petition for a writ of certiorari was filed on April 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

On May 25, 1995, petitioner entered a plea of guilty in the United States District Court for the Eastern District of Louisiana to one count of conspiracy to distribute marijuana, in violation of 21 U.S.C. 846, one

count of distributing marijuana, in violation of 21 U.S.C. 841(a)(1), and one count of using or carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). Before petitioner was sentenced, he moved to quash or dismiss the Section 924(c) count of the indictment, in light of this Court's decision in *Bailey* v. *United States*, 116 S. Ct. 501 (1995). The district court granted the motion (Pet. App. 8a-11a), and the court of appeals reversed. Pet. App. 1a-7a.

1. On May 25, 1995, petitioner entered a plea of guilty to, *inter alia*, using or carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). At the plea hearing, the government submitted a factual statement signed by petitioner. Gov't C.A. Br. 3. The statement established that, following negotiations with a cooperating individual (CI) and an undercover agent of the Drug Enforcement Administration (DEA), petitioner arranged for the delivery of a total of eight pounds of marijuana in two separate transactions. Both the negotiations and the payment for the marijuana took place in petitioner's Ford pick-up truck. In the first transaction, petitioner led the CI and the DEA agent to a location where marijuana had been left in a plastic bag at the side of the road. In a second transaction on the same day, petitioner again led the CI and the DEA agent to a certain location, and upon arrival, petitioner removed plastic bags containing marijuana from his vehicle. Following petitioner's arrest, a loaded firearm was found in the locked glove compartment of his truck. Gov't C.A. Br. 4-5; Pet. App. 8a. The signed factual statement asserted that this firearm was "knowing[ly] possessed in [petitioner's] vehicle and carried for protection in relation [to] the above



described drug trafficking offense." Gov't C.A. Br. 5. At the plea hearing, petitioner attested under oath to the accuracy of the written factual statement. *Id.* at 6.

2. a. On March 7, 1996, before petitioner was sentenced, he filed a motion in the district court pursuant to Federal Rule of Criminal Procedure 12(b)(2) to quash or dismiss the Section 924(c) count of the indictment. Petitioner argued that the charge was legally defective in light of this Court's decision in *Bailey*. The government opposed the motion on the ground that the factual statement established that petitioner had "carried" the firearm within the meaning of Section 924(c). Following a hearing, the district court granted the motion to dismiss. Pet. App. 8a-11a.

The court acknowledged that, in his signed factual statement, petitioner admitted that he knowingly possessed and carried the firearm in his vehicle for protection in relation to his drug trafficking offenses. Pet. App. 9a-10a. The court relied instead, however, on the following statement from the presentence investigation report:

> As to the weapon, [petitioner] does not deny his possession of the pistol. The pistol was in the glove compartment of his truck where it had been for a long period of time. He denies any conscious decision to carry the gun in relation to the marijuana sale, and stated that he carried it in relation to his job with the Tangipahoa Parish Sheriff's Office as a balif [*sic*] at the Courthouse in Amite.

*Id.* at 10a. The court accordingly concluded that:

> [petitioner] did not knowingly possess the firearm *in relation to* a drug-trafficking crime. To the

> contrary, [petitioner], his employment background considered, knowingly possessed the firearm in the glove compartment of his vehicle in furtherance of his job requirements and not for active employment in the charged transaction.

*Ibid.* The district court therefore granted petitioner's motion to dismiss the Section 924(c) count, although it did not rely on *Bailey* in doing so.

b. The district court denied the government's motion for reconsideration. Pet. App. 12a-13a. The court again acknowledged that petitioner had admitted carrying the gun for protection in relation to his drug trafficking, but the court noted that "this is a pre[-]*Bailey* composition by the government and a pre[-]*Bailey* consideration by [petitioner] and his counsel." *Id.* at 12a. Again citing the above-quoted language from the presentence report, the district court reaffirmed its conclusion that petitioner "did *carry* a firearm in the [locked] glove compartment of his vehicle, but not *in relation* to the commission of a drug trafficking crime." *Id.* at 13a.

3. The court of appeals reversed in a per curiam decision. Pet. App. 1a-7a. The court first noted that, because *Bailey* did not address the "carrying" prong of Section 924(c), its prior "carrying" jurisprudence remained valid. *Id.* at 4a. Under the court's pre-*Bailey* decision in *United States* v. *Pineda-Ortuno*, 952 F.2d 98, 104 (5th Cir.), cert. denied, 504 U.S. 928 (1992), "the 'carrying' require-ment of § 924(c) is met if the operator of the vehicle knowingly possesses the firearm in the vehicle during and in relation to a drug trafficking crime." Pet. App. 4a-5a.



The court held that the district court had erred in two respects: first, by discrediting as a "pre-*Bailey* composition" the factual statement in which petitioner had concurred, and second, by relying on petitioner's "post-conviction, self-serving declaration to the probation officer * * * regarding his subjective intent in possessing the pistol in the truck." Pet. App. 5a. Those errors, the court concluded, required reversal of the district court's decision. *Id.* at 6a-7a.

The court went on to reaffirm *Pineda-Ortuno*'s holding that "[w]hen a vehicle is used, 'carrying' takes on a different meaning from carrying on a person because the means of carrying is the vehicle itself." Pet. App. 6a. Thus, the court reasoned, "the fact that [petitioner's] glove compartment was locked does not prevent conviction." *Ibid.*

## ARGUMENT

Petitioner contends (Pet. 6-11) that this Court should grant review to resolve the conflict in the circuits on the question whether a conviction under Section 924(c) for "carrying" a firearm in a vehicle requires proof that the firearm was immediately accessible to the defendant. The court of appeals in this case correctly held that immediate accessibility is not required, and the conflict identified by petitioner does not warrant further review at this time.

1. a. Because Section 924(c) does not define "carry," the term must be interpreted "in accord with its ordinary or natural meaning." *Smith* v. *United States*, 508 U.S. 223, 228 (1993) (analyzing "use" prong of Section 924(c)). The court of appeals in this case correctly determined that "carry[ing]" refers simply to the act of transporting an object, and that its plain

meaning does not include the limitation that the carried object be "immediately accessible." See Pet. App. 4a-5a.

The primary definition of "carry" supplied by *Webster's Third New International Dictionary* 343 (1976) (emphasis added) is:

> to move while supporting (*as in a vehicle* or in one's hands or arms): move an appreciable distance without dragging: sustain as a burden or load and bring along to another place.

Indeed, the word "carry" derives from the French "carier," which means "to transport in a vehicle." See *ibid.* The dictionary employed by this Court in *Bailey* v. *United States*, 116 S. Ct. 501, 506 (1995), and *Smith* offers an even more expansive definition of "carry":

> To convey, or transport, while supporting, originally in a cart or car, hence in any manner; to bear; to transfer; to transmit, to take.

*Webster's New International Dictionary of the English Language* 412 (2d ed. 1958). In short, to carry an object means to transport it. Although it is frequently true that a carried object is immediately accessible, the ordinary meaning of the verb does not necessarily require that element.

As the Fifth Circuit has cogently explained in a case involving the carrying of a firearm in a vehicle:

> Those cases * * * that would seem to suggest that for there to be a "carrying" the weapons must be located within such proximity so as to make them immediately available for use are distinguishable. The cases requiring "easy reach" are the result of judicial expansions of the definition of "carrying" in a nonvehicle context. When a vehicle is used, "carrying" takes on a different meaning from carrying on the person because the means of carrying is the vehicle itself.



*United States* v. *Pineda-Ortuno*, 952 F.2d 98, 104 (5th Cir.), (citations omitted), cert. denied, 504 U.S. 928 (1992). Several other circuits agree that "when a motor vehicle is used, 'carrying a weapon' takes on a less restrictive meaning than carrying on the person. The means of carrying is the vehicle, itself, rather than the defendant's hands or pocket." *United States* v. *Cardenas*, 864 F.2d 1528, 1535-1536 (10th Cir.), cert. denied, 491 U.S. 909 (1989); accord *United States* v. *Freisinger*, 937 F.2d 383, 387 & n.4 (8th Cir. 1991) (agreeing with *Cardenas* reasoning and affirming Section 924(c) conviction where firearms found in passenger compartment of car); *United States* v. *Farris*, 77 F.3d 391, 395 (11th Cir.) (same), cert. denied, 117 S. Ct. 241 (1996).

Petitioner's reliance (Pet. 14) on the definition of the specific phrase "to carry arms or weapons," is misplaced.[1] First, Section 924(c) does not use that precise language. Second, that definition would restrict "carrying" to situations in which the firearm is physically worn on the defendant's person or in his clothing. As the First Circuit has recognized, no court has held that the term "carry" is so limited. *United States* v. *Cleveland*, 106 F.3d 1056, 1067 (1997), petition for cert. pending, No. 96-8837. Instead, every circuit to consider the question has recognized that a firearm may be "carried" in a vehicle. And as the

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[1] *Black's Law Dictionary* defines that phrase to mean: "To wear, bear, or carry them upon the person or in the clothing or in a pocket." *Black's Law Dictionary* 214 (6th ed. 1990).

above-cited definitions demonstrate, such a "carrying" takes place whenever a firearm is transported; the element of immediate accessibility plays no part in the ordinary definition of "carry."[2]

b. Contrary to petitioner's assertion (Pet. 13-14), the court of appeals' interpretation of "carrying" does not conflict with the reasoning in *Bailey*. *Bailey* concerned only the "use" prong of Section 924(c). To the extent that *Bailey* addressed the meaning of the term "carry," the Court simply made clear that "carry" had a meaning independent of "use," because Congress intended each prong of Section 924(c) "to have a particular, nonsuperfluous meaning." 116 S. Ct. at 507. Thus, the Court explained, under the "active employment" definition it adopted,

> a firearm can be used without being carried, *e.g.*, when an offender has a gun on display during a transaction, or barters with a firearm without handling it; and a firearm can be carried without being used, *e.g.*, when an offender keeps a gun hidden in his clothing throughout a drug transaction.

*Ibid.*

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[2] The location of the firearm in a vehicle and its accessibility to the defendant may be relevant in assessing whether the firearm was carried "in relation to" the drug crime. See *Cleveland*, 106 F.3d at 1067; *United States* v. *Miller*, 84 F.3d 1244, 1260 (10th Cir.) ("[t]o establish th[e] nexus" required by the "during and in relation to" element of Section 924(c)(1), court may consider accessibility of firearm to defendant and proximity of firearm to drugs), cert. denied, 117 S. Ct. 443 (1996). But the accessibility of the firearm in the vehicle has nothing to do with whether the firearm is carried from one place to another when the defendant moves the vehicle.



The decision of the court of appeals does not contravene that aspect of *Bailey*. Under the court of appeals' interpretation, "carrying" still encompasses a great many scenarios that are not also "uses." For example, the defendant who places a firearm in his vehicle, then drives to another location where he consummates a drug deal in or near his car, has not "actively employed" (*i.e.*, "used") the firearm, but he has carried it. See *United States* v. *Miller*, 84 F.3d 1244, 1260 (10th Cir.) (rejecting requirement of ready access for "carrying," and noting that, under that interpretation, "the 'carry' prong applies in a great many situations in which the post-*Bailey* definition of the 'use' prong would not"), cert. denied, 117 S. Ct. 443 (1996).

*Bailey* also held that the term "use" in Section 924(c) "must connote more than mere possession of a firearm by a person who commits a drug offense," because if Congress had meant to punish mere possession, it could have so provided. 116 S. Ct. at 506. Contrary to petitioner's contention (Pet. 12-13), the decision of the court of appeals does not expand the "carry" prong to reach all acts of possession, because a defendant who carries a firearm in a vehicle has done more than passively possess it, regardless of whether he has immediate access to it.[3] The defend-

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[3] The Fifth Circuit's definition of "carrying" plainly includes the element of transportation. See *United States* v. *Fike*, 82 F.3d 1315, 1328. ("In placing a gun under the driver's seat of a car, then driving the car to another location, one has carried the gun."), cert. denied, 117 S. Ct. 241 (1996); *United States* v. *Speer*, 30 F.3d 605, 612 ("The 'carrying' requirement of Section 924(c) is met where a defendant operates a vehicle knowing the firearm is in the car."), cert. denied, 513 U.S. 1028 (1994); *Pineda-Ortuno*, 952 F.2d at 104 (endorsing plain

ant has, by definition, transported or conveyed the firearm; he has "move[d] [the firearm] an appreciable distance without dragging" it, and has "br[ought] [it] along to another place," in connection with a drug trafficking offense. *Webster's Third New International Dictionary* 343 (1976).[4]

2. In the wake of *Bailey*, five circuits have agreed that a defendant who transports a firearm in a vehicle has "carried" the firearm, regardless of the weapon's accessibility. Those courts hold that vehicular "carrying" under Section 924(c) requires only two elements: "It is the *possession* of the firearm coupled with the *affirmative act of transporting it* during and in relation to a drug trafficking crime–that precipitates liability under § 924(c)(1)." *United States* v. *Molina*, 102 F.3d 928, 930 (7th Cir. 1996) (citation omitted; emphasis added)[5]; see also *United States* v.

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and ordinary definition of "carry," which includes transportation or movement).

[4] Petitioner argues implicitly that the element of immediate accessibility will somehow distinguish "carrying" a firearm from mere possession of the firearm. That reasoning turns *Bailey* on its head. In *Bailey*, the Court expressly rejected the claim that the placement of a weapon, or its "proximity and accessibility," standing alone, "amounted to something more than mere possession." 116 S. Ct. at 506. In the same vein, proximity and accessibility cannot be what distinguishes mere storage of a weapon in a vehicle from the carrying of that weapon. Instead, as the court of appeals correctly concluded, a weapon is "carried," within the plain and ordinary meaning of that term, whenever it is transported in a vehicle, regardless of its accessibility to the defendant. The active element of transportation is what distinguishes "carrying" from mere possession.

[5] Despite the "recent and very clear" holding of *Molina* (*United States* v. *Cooke*, 110 F.3d 1288, 1302 (7th Cir. 1997)



*Mitchell*, 104 F.3d 649, 653 (4th Cir. 1997) ("the plain meaning of the term 'carry' * * * requires knowing possession and bearing, movement, conveyance, or transportation of the firearm in some manner"); *Miller*, 84 F.3d at 1259 ("the government is required to prove only that the defendant transported a firearm in a vehicle and that he had actual or constructive possession of the firearm while doing so"); *United States* v. *Rivas*, 85 F.3d 193, 195 (5th Cir.) ("the 'carrying' requirement of § 924(c) is met 'if the operator of the vehicle knowingly possesses the firearm in the vehicle during and in relation to a drug trafficking crime'" (quoting *Pineda-Ortuno*, 952 F.2d at 104)), cert. denied, 117 S. Ct. 593 (1996); *Cleveland*, 106 F.3d at 1066-1067 ("the concept of whether or not the carried item is within reach plays no part in the definition" of "carry"). These courts have uniformly reasoned that the plain meaning of "carry" does not, in the vehicular context, include the limitation of immediate accessibility and that nothing in *Bailey* requires such a limitation.[6]

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(Coffey, J., concurring)), a subsequent panel of the Seventh Circuit has inexplicably asserted that it remains an open question whether immediate accessibility is an element of "carrying." *Id.* at 1298. The discussion of the issue in *Cooke* was itself dicta, however. See *id.* at 1297.

[6] In addition, decisions from several other courts suggest that they may follow suit when the issue of firearm-accessibility in a vehicle is squarely presented. See, *e.g.*, *Farris*, 77 F.3d at 395 (holding that jury could find weapon in glove compartment "carried" where vehicle used as drug distribution center and defendant "knew the firearm was in the automobile"); *United States* v. *Barry*, 98 F.3d 373, 377 (8th Cir. 1996) (affirming "carry" conviction where gun found in glove compartment; "*Bailey* does not require us to abandon" holding that "the common usage of 'carries' include[s] 'carries in a vehicle'"),

The Second, Sixth, and Ninth Circuits, on the other hand, have held that a weapon must be immediately available to the defendant in order to be carried. It remains to be seen, however, whether those courts will adhere to that view in the face of the growing weight of contrary authority. On June 12, 1997, the Sixth Circuit granted the government's suggestion for rehearing en banc of *United States* v. *Malcuit*, 104 F.3d 880 (1997). See App., *infra*, 1a-2a. And the Ninth Circuit also appears to be giving serious consideration to rehearing the issue presented here. The government has filed a suggestion for rehearing en banc of *United States* v. *Foster*, 96 F.3d 1177 (9th Cir. 1996) (withdrawn). The court of appeals has withdrawn its opinion in that case, and recently requested a supplemental brief from the government on the issue of the need for en banc review to reconcile the Ninth Circuit's own precedents.[7] Although the Second Circuit recently denied the government's suggestion for rehearing en banc of *United States* v. *Cruz-Rojas*, 101 F.3d 283 (1996), that court might be inclined to reconsider its views if the Ninth Circuit were to join the Sixth in granting rehearing. Because there is a

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cert. denied, 117 S. Ct. 1014 (1997); *Freisinger*, 937 F.2d at 387-388 & n.4 (finding defendant "carried" firearms found in knotted pillowcase inside plastic bag on floor of vehicle).

[7] In *United States* v. *Barber*, 594 F.2d 1242, cert. denied, 444 U.S. 835 (1979), a pre-*Bailey* case, the Ninth Circuit squarely rejected the contention that "the word 'carries,' as used in [Section 924(c)], connotes only the concept of bearing the weapon upon one's person or having the gun within his immediate control." *Id.* at 1244. The *Barber* court affirmed the conviction of a defendant who was carrying a firearm in the locked glove compartment of his car during a drug offense. *Id.* at 1243.



reasonable possibility that the courts of appeals will themselves eliminate the conflict of authority, we believe that review by this Court is not warranted at this time.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1997

**APPENDIX**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 95-3794

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

THOMAS A. MALCUIT, DEFENDANT-APPELLANT

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[Filed: June 12, 1997]

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**ORDER**

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Before: MARTIN, Chief Judge; MERRITT, KENNEDY, NELSON, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, BATCHELDER, DAUGHTREY, MOORE and COLE, Circuit Judges.

It now appearing that the requisite number of judges in regular active service have voted for rehearing en banc; it is **ORDERED** that the order of June 9, 1997 is hereby withdrawn; it is further **ORDERED**, as provided in Sixth Circuit Rule 14, that the previous decision and judgment of this court are vacated, the mandate is stayed and the case is restored to the docket as a pending appeal.

It is further **ORDERED** that the appellant file a supplemental brief not later than Friday, August 22,

1997, and the appellee file a supplemental brief not later than Monday, September 22, 1997. The Clerk will schedule this case for argument as directed by the court.

**ENTERED BY ORDER OF THE COURT**

/s/ LEONARD GREEN
LEONARD GREEN, Clerk

Supreme Court, U.S.
FILED
JUL 7 1997
OFFICE OF THE CLERK

(3)

No. 96-1654

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

FRANK J. MUSCARELLO,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## REPLY BRIEF FOR THE PETITIONER

1. In his petition, petitioner Frank J. Muscarello demonstrated: (1) that there is a clear conflict among the courts of appeals with respect to the proper construction of the phrase "carries a firearm" in 18 U.S.C. § 924(c)(1) (Pet. 6-11); (2) that this is a critical and recurring question of federal criminal law (Pet. 11-12); and (3) that the decision of the Fifth Circuit below was plainly wrong (Pet. 12-14). The government does not and cannot dispute either the existence of a conflict or the critical importance of the question (nor does it deny that the present case presents an appropriate vehicle for deciding the issue).[1] The government instead devotes the lion's share of its brief in opposition ("Opp.") to arguing that "[t]he court of appeals in this case correctly determined" the issue (Opp. 5-10), adding at the end that certiorari "is not warranted at this time" because there is a "possibility" that the three courts of appeals that currently apply an "immediate accessability" requirement "might be inclined" to utilize their *en banc* procedures, reverse course, and decide the issue presented in favor of the government. (Opp. 12-13).

As petitioner shows below, all of the government's arguments are erroneous. There is an urgent need for uniformity on this important national issue, and there is no "reasonable possibility" that the conflicting interpretations of § 924(c)(1) will be resolved without this Court's intervention. Certiorari should be granted.

2. The government acknowledges, as it must, that there currently is a substantial conflict among the circuits on this

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[1] The government has also opposed certiorari (on virtually identical grounds) in a similar case filed after the instant petition, *Cleveland v. United States*, No. 96-8837. The present case provides a far superior vehicle for resolving the issue presented than does *Cleveland* because (1) the First Circuit below in *Cleveland* identified, but did not rule upon, a potential jurisdictional bar to petitioner's claim (*see United States v. Cleveland*, 106 F.3d 1056, 1065 (1st Cir.), *pet. for cert. filed*, No. 96-8837 (Apr. 30, 1997)), and (2) the defendant in *Cleveland* unquestionably physically "carried" the firearm to the vehicle on his person in the course of the drug transaction. *Id.* at 1059.

pressing and important issue of federal criminal law. *See* Opp. 10-13. Faced with this square conflict, the government takes the position that, even though the question presented by this case is certworthy at this time, it may become unworthy of certiorari *later* through a series of possible *en banc* rulings. Specifically, the government asks that certiorari be denied because of the "possibility" that four contingencies all conceivably "might" occur to resolve the conflict in the government's favor: (1) the *en banc* Sixth Circuit "might" overturn its settled precedents on § 924(c)(1)'s carry prong and rule in the government's favor; (2) the *en banc* Ninth Circuit "might" do the same; (3) those possible rulings "might," in turn, cause the Second Circuit to grant rehearing *en banc* in a future case raising this issue, even though that court unanimously denied *en banc* review on this identical question less than four months ago (*See* Opp. 12); and (4) the Second Circuit itself "might," in turn, reverse its decade-old position on the issue. Of course, in the interim, the five circuits that currently agree with the government's position must not themselves reverse course *en banc*, and none of the four circuits where the question remains open can rule against the government.[2] While the implausibility of this scenario speaks for itself, petitioner feels obliged not to let it go completely unanswered.

3. Initially, there is no question that the split in the circuits continues unabated. No matter what inferences the government might hope to draw from the Sixth Circuit's *en banc* consideration of this issue, neither the Ninth Circuit nor the Second Circuit has shown the slightest indication that they will abandon the "immediate accessibility" standard. As the government acknowledges (Opp. 12), the Ninth Circuit is considering the

[2] This is far from certain. *See, e.g., United States v. Nelson*, 109 F.3d 1323, 1326 (8th Cir. 1997) ("assum[ing], without deciding, that ready availability of the firearm is required for a 'carry' conviction in this Circuit"); *United States v. Moore*, 104 F.3d 377, 380 (D.C. Cir. 1997) (accepting government's concession that remand on "carry" charge was required where firearm was in engine compartment).



question *en banc* "to reconcile" its ten recent decisions applying the immediate accessibility standard (*see* Pet. App. 14a-15a) with a single, pre-*Bailey* (1979) panel ruling in favor of the government. Nothing suggests that the Ninth Circuit will agree with the government on the merits; indeed, given the unanimity of the Ninth Circuit's post-*Bailey* panel opinions on this issue, it is at best speculative that the *en banc* court will side in favor of the government. Moreover, as is discussed below, the Second Circuit has *refused* to reconsider the issue *en banc*, and it is all but certain that it will not do so in the foreseeable future.

It is essential that this continuing division in the circuits be resolved as soon as practicable — not at some indeterminate date years in the future — in order to ensure fairness in prosecution. Indeed, the United States has stressed that "there is a *pressing need for national uniformity* on this *frequently-litigated issue* because Section 924(c) can carry a mandatory consecutive sentence of up to 30 years, even for first-time offenders." Suggestion of Rehearing *En Banc* at 13, *United States v. Malcuit*, 104 F.3d 880 (6th Cir. 1997) (No. 95-3794) (granted June 11, 1997) (emphasis added). Moreover, as the government has argued, given that "Section 924(c) can carry a mandatory consecutive sentence of as much as 30 years, even for first time offenders, [and that] [r]epeat offenders can receive sentences as long as life imprisonment," "*[a]ny disagreement* among the circuits on the meaning of 'carry' will inevitably cause the sentences for *identically situated* defendants in different parts of the country to differ *radically*." Suggestion of Rehearing *En Banc* at 12-13, *United States v. Foster*, 96 F.3d 1177 (9th Cir. 1996) (No. 89-10405) (granted June 11, 1997) (emphasis added).

4. Since, in the government's view, "any disagreement" among the circuits is intolerable, the government's theory here depends on the willingness of *all* circuits to agree with its construction of § 924(c)(1). But even if the government's speculations come to pass, and the Sixth and Ninth Circuits side with the government *en banc*, there simply is no realistic chance the Second Circuit will grant rehearing *en banc* and reverse its current case law, and therefore no realistic chance that the conflict

will *ever* be resolved without this Court's intervention. Second Circuit precedent on the scope of § 924(c)(1)'s carry prong has been settled for a decade[3] and repeatedly reaffirmed after *Bailey*; seven of its ten active judges have addressed the question, and every single one has voted to apply the "immediate accessibility" standard without dissent.[4] Indeed, when the government sought rehearing *en banc* in *United v. Cruz-Rojas*, 101 F.3d 283 (2d Cir. 1996), the suggestion of rehearing *en banc* was not just denied, but denied *without a single judge calling for a response or the taking of a vote*. (*See* App. 1a, *infra*.)

Given these facts, it is a virtual certainty that the Second Circuit will not review this issue *en banc* regardless of what happens in the Sixth and Ninth Circuits. Indeed, in the past twenty years, the Second Circuit has accepted a *total* of only 26 cases for *en banc* review. As former Chief Judge Newman has explained, the Second Circuit's *en banc* practice has one "salient characteristic": "the continuation of an extremely low rate of rehearings in banc." Jon O. Newman, *In Banc Practice in the Second Circuit, 1989-93*, 60 BROOK. L. REV. 491, 491 (1994) [hereinafter *1989-1993 Survey*]. In the most recent period surveyed by Judge Newman, "the Second Circuit reheard in banc only 6 cases, an average of 1.2 cases per year. This figure is considerably lower than the average of 7.65 cases per year for all the federal courts of appeals." *Id.* Since then, the average has

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[3] *See United States v. Giraldo*, 80 F.3d 667, 676 (2d Cir. 1996) ("In *United States v. Feliz-Cordero*, 859 F.2d 250 (2d Cir. 1988) . . ., we . . . . stated that 'a person cannot be said to "carry" a firearm without at least a showing that the gun is within reach during the commission of the drug offense.'"), *cert. denied*, 117 S. Ct. 135 (1996).

[4] *Cruz-Rojas*, 101 F.3d 283 (2d Cir. 1996) (Calabresi and Parker, JJ.); *United States v. Collins*, 104 F.3d 354 (table), 1996 WL 658733, at *2-*3 (2d Cir. Nov. 12, 1996) (Meskill, Calabresi, and Cabranes, JJ.); *United States v. Pimentel*, 83 F.3d 55 (2d Cir. 1996) (Newman, C.J., and Kearse, J.); *United States v. Giraldo*, 80 F.3d 667 (Kearse and Walker, JJ.); *United States v. Feliz-Cordero*, 859 F.2d 250 (Winter and Miner, JJ.).



been even lower: one per year.[5] The strikingly low number of *en banc* cases reflects "a view, strongly held by all members of the court, that, in bancs are normally not a wise use of judicial resources." Jon O. Newman, *In Banc Practice in the Second Circuit, 1984-1988*, 55 Brook. L. Rev. 355, 369 (1989). Judge Newman has further predicted that even with the changing membership of the Second Circuit, "the pattern that I have observed during the past fifteen years—years in which we have reheard only nineteen cases in banc—will likely continue." *1989-1993 Survey*, *supra*, at 502.

The unanimous acceptance of an "immediate accessibility" requirement by the judges of the Second Circuit virtually guarantees that a subsequent suggestion of rehearing *en banc* would be denied. In the entire two-decade period petitioner has surveyed, the Second Circuit granted *en banc* consideration of a prior ruling when there was no open division within the court only *twice*.[6] Moreover, neither of those cases apparently involved a claim that the court was in the minority of a circuit split. Instead, almost every Second Circuit *en banc* ruling arose from either a divided panel opinion[7] or a panel opinion openly

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[5] The annual number of Second Circuit *en banc* rulings per year after 1993 is: 1994 (0); 1995 (1); 1996 (2); 1997 (1).

[6] *Asherman v. Meachum*, 957 F.2d 978 (2d Cir. 1992) (en banc); *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (en banc) (per curiam).

[7] *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir.) (en banc), *cert. denied*, 439 U.S. 946 (1978); *Van Gemert v. Boeing*, 590 F.2d 433 (2d Cir. 1978) (en banc), *aff'd*, 444 U.S. 472 (1980); *United States v. Muse*, 633 F.2d 1041 (2d Cir.) (en banc), *cert. denied*, 450 U.S. 984 (1981); *Alcoa Steamship Co. v. M/V Nordic Regent*, 654 F.2d 147 (2d Cir.) (en banc), *cert. denied*, 449 U.S. 890 (1980); *Daye v. Attorney General*, 696 F.2d 186 (2d Cir. 1982) (en banc); *New York v. 11 Cornwell Co.*, 718 F.2d 22 (2d Cir. 1983) (en banc); *United States v.*

calling prior circuit precedent into question.[8] Because neither of

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*O'Grady*, 742 F.2d 682 (2d Cir. 1984) (en banc); *In re Grand Jury Subpoena Served Upon John Doe, Esq.*, 781 F.2d 238 (2d Cir.) (en banc), *cert. denied*, 475 U.S. 1108 (1986); *United States v. Capo*, 817 F.2d 947 (2d Cir. 1987) (en banc); *Albert v. Carovano*, 851 F.2d 561 (2d Cir. 1988) (en banc); *United States v. Monsanto*, 852 F.2d 1400 (2d Cir. 1988) (en banc) (per curiam), *rev'd*, 491 U.S. 600 (1989); *United States v. MacDonald*, 916 F.2d 766 (2d Cir. 1990) (en banc), *cert. denied*, 498 U.S. 1119 (1991); *United States v. Chestman*, 947 F.2d 551 (2d Cir. 1991) (en banc), *cert. denied*, 503 U.S. 1004 (1992); *Bellamy v. Cogdell*, 974 F.2d 302 (2d Cir. 1992) (en banc), *cert. denied*, 507 U.S. 960 (1993); *In re Extradition of McMullen*, 989 F.2d 603 (2d Cir.) (en banc), *cert. denied*, 510 U.S. 913 (1993); *Pro-Choice Network v. Schenck*, 67 F.3d 377 (2d Cir. 1995) (en banc), *aff'd in part and rev'd in part*, 117 S. Ct. 855 (1997). In *United States v. Dinapoli*, 8 F.3d 909 (2d Cir. 1993) (en banc), rehearing en banc had been denied at an earlier stage over a published dissent, and was subsequently granted after a ruling by this Court and the panel's third ruling in the case.

[8] *Armstrong v. McAlpin*, 606 F.2d 28, 30 n.1 (2d Cir. 1979) (panel op. of Newman, J.) (calling into question *Silver Chrysler Plymouth v. Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974) (en banc)), *vacated*, 625 F.2d 433 (2d Cir. 1980) (en banc) (overruling *Silver Chrysler*); *Black v. Red Star Towing & Trans. Co.*, 860 F.2d 30 (2d Cir. 1988) (en banc) (overruling *The Federal No. 2*, 21 F.2d 313 (2d Cir. 1927)); *Beauford v. Helmsley*, 865 F.2d 1386, 1388 (2d Cir.) (en banc) (noting that "[a] unanimous panel of this Court affirmed the decision of the district court, but suggested that the appeal be 'reheard en banc to clarify Second Circuit law.'" (citation omitted)), *vacated*, 492 U.S. 914 (1989). In the fourth case, *United States v. Indelicato*, 865 F.2d 1370 (2d Cir.) (en banc), *cert. denied*, 493 U.S. 811 (1989), *en banc* consideration apparently was granted *sua sponte* so that the case could be considered with *Beauford*, *supra*.

Two other rulings did not arise directly from a panel ruling. *Turpin v. Mailet*, 579 F.2d 152 (2d Cir.) (en banc), *vacated*, 439 U.S. 974 (1978), apparently was never assigned to a panel. In *Fisher v. Vassar College*, No. 94-7737, 1997 WL 310467 (2d Cir. June 5, 1997) (en banc), *en banc* consideration was only granted on a limited issue which



those circumstances is present here, the government's scenario, under which the Second Circuit must both grant rehearing *en banc* and reverse its settled course, is nothing but wishful thinking.

5. Delaying this Court's inevitable ruling on the issue presented will have grave consequences for the Federal judiciary. The government inexplicably believes that it is more appropriate to have dozens of circuit judges consider § 924(c)(1)'s carry prong in the *hope* that this Court will not have to address it as well. Moreover, as the government has previously stressed, "[t]he number of cases affected by a circuit split over this issue will be very great": "much larger than" 250 cases. *See* Suggestion for Rehearing *En Banc* at 13 n.7, *United States v. Foster*, 96 F.3d 1177. If this Court were to accede to the government's request here, and later decide this issue against the government, hundreds of defendants will bring habeas corpus petitions pursuant to 28 U.S.C. § 2255, inundating the courts with collateral attacks on their § 924(c)(1) convictions. This has been the experience of the lower courts after *Bailey*, which "unleashed a flood of § 2255 petitions in the district courts." *United States v. Hillary*, 106 F.3d 1170, 1172 n.1 (4th Cir. 1997). Because further delay will only increase the total number of potential § 2255 claimants, the government's invitation to procrastination has the very real potential to further burden an already overburdened federal judiciary.

Further, the government's theory represents an unprecedented and unsound approach to this Court's certiorari jurisdiction. There is a "possibility" that every circuit split now in existence "might" be resolved by subsequent *en banc* rulings of the courts of appeals. Under the government's approach, this Court would never grant review to resolve a circuit conflict but would simply wait, however long, for the courts of appeals to achieve

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was never addressed by the panel and which was raised within the court only "*[d]uring consideration* of the Petition for Rehearing In Banc." *Id.* at *1 (emphasis added).

unanimity. In fact, the absurdity of such a delaying tactic reaches its height here, where the government hopes for not one, not two, but *three en banc* reversals.

6. With such an extraordinarily weak case for opposing certiorari, and such a firm split among the circuits, it is not surprising that the government devotes only one page in its brief to the issue, arguing instead at some length (Opp. 5-10) that its position is correct on the merits. Petitioner, of course, agrees that the merits of this issue should be addressed by this Court, and stands ready and willing to brief and argue the merits on plenary review. But since the government has seen fit to argue the correctness of the decision below as the principal reason for denying review, petitioner responds in kind.

As petitioner showed in the petition (at 12-14), this Court's decision in *Bailey* teaches that § 924(c)(1) must be interpreted in accordance with "its 'ordinarily or natural' meaning." *Bailey v. United States*, 116 S. Ct. 501, 506 (1995) (quoting *Smith v. United States*, 508 U.S. 223, 228 (1993)). The government's argument that "to carry an object means to transport it" (Opp. 6) flouts this principle because it focuses in isolation upon the word "carry," instead of the contextual *phrase* of § 924(c)(1) — "carries a firearm." The government urges that "[t]he primary definition of 'carry' in the dictionary includes movement in a vehicle." (Opp. 6). But, as Justices Scalia, Stevens, and Souter have already recognized (as has then-Chief Judge Breyer), the phrase "carries a firearm" is much more limited — *i.e.*, it encompasses not merely "carrying" in any fashion, as the government would have it, but "carrying it in such manner as to be ready for use as a weapon." *Smith*, 508 U.S. at 245-46 (Scalia, J., joined by Stevens and Souter, JJ. dissenting); *see also United States v. McFadden*, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, J., dissenting).

Finally, "carrying" a firearm must also be interpreted in accord with its "placement and purpose in the statutory scheme," *Bailey*, 116 S. Ct. at 506. In *Bailey*, this Court rejected the government's claim that § 924(c)(1)'s reference to "use" meant



merely "possess." "Had Congress intended possession alone to trigger liability under § 924(c)(1), it easily could have so provided," as evidenced "by the frequent use of the term 'possess' in the gun-crime statutes to describe prohibited gun-related conduct." *Id.* The same is true here. Several of the same sections that the Court cited in *Bailey* criminalize not just "possession," but also "transportation." *E.g.*, 18 U.S.C. §§ 922(g), 922(k). Moreover, § 924 *itself* criminalizes transportation. *See id.* § 924(b) ("Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, . . . ships, *transports*, or receives a firearm or any ammunition in interstate or foreign commerce [commits a crime]." (emphasis added)). The government's "carry equals transport" argument thus fails: Had Congress intended § 924(c)(1) to impose mandatory prison sentences for the transportation of a firearm, "it easily could have so provided." But it clearly did not do so.

* * * *

In sum, the government's argument that certiorari on this concededly important issue "is not warranted at this time" (Opp. 13) is untenable: the conflict is clear and it will not be resolved without this Court's intervention. Further delay in resolving this conflict will only prejudice the federal criminal justice system. Certiorari "at this time" is indeed warranted.

## CONCLUSION

For the foregoing reasons, as well as those stated in the petition, certiorari should be granted.

Respectfully submitted,

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## APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 Foley Square
New York 10007

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 20th day of March one thousand nine hundred and ninety-seven.

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USA
v. Dkt. No: 95-1711
Cruz-Rojas

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A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellee, United States of America.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing *en banc* has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

**FOR THE COURT**

GEORGE LANGE III, Clerk

By:/s/ Beth J. Meador
Beth J. Meador
Administrative Attorney

Supreme Court, U.S.
FILED
JAN 23 1998
CLERK

No. 96-1654

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

FRANK J. MUSCARELLO,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## JOINT APPENDIX

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Certiorari Granted December 12, 1997

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## RELEVANT DOCKET ENTRIES

I. BEFORE THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

*United States v. Frank J. Muscarello*, No. 95-2-E

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| 1. | 1/5/95 | INDICTMENT in United States District Court for the Eastern District of Louisiana filed. |
| 2. | 5/25/95 | PLEA AGREEMENT as to Frank J. Muscarello filed. |
| 3. | 5/25/95 | RE-ARRANGEMENT of Frank J. Muscarello and guilty plea entered. |
| 4. | 3/8/96 | MOTION to quash and/or to dismiss count 3 of the indictment as to Frank J. Muscarello filed. |
| 5. | 4/4/96 | MEMORANDUM IN OPPOSITION by the United States to the motion to quash and/or to dismiss count 3 of the indictment as to Frank J. Muscarello filed. |
| 6. | 4/10/96 | HEARING on motion to quash and/or to dismiss count 3 of the indictment as to Frank J. Muscarello held. |
| 7. | 4/11/96 | ORDER by Judge Marcel Livaudais granting motion to quash and/or to dismiss count 3 of the indictment as to Frank J. Muscarello entered. |
| 8. | 4/19/96 | MOTION by the United States for reconsideration of "quash and/or dismissal order" of April 11, 1996 as to Frank J. Muscarello filed. |
| 9. | 5/7/96 | ORDER by Judge Marcel Livaudais denying motion by the United States for reconsideration of "quash and/or dismissal order" |

of April 11, 1996 as to Frank J. Muscarello entered.

10. 6/7/96 NOTICE OF APPEAL by the United States from Judge Marcel Livaudais' order entered on May 7, 1996.

II. BEFORE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

*United States v. Frank J. Muscarello*, No. 96-30591

1. 8/5/96 MERITS BRIEF of appellant United States filed.

2. 9/4/96 MERITS BRIEF of appellee Frank J. Muscarello filed.

3. 2/13/97 OPINION of the United States Court of Appeals for the Fifth Circuit filed.

III. BEFORE THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

*United States v. Frank J. Muscarello*, No. 95-2-E

1. 4/16/97 SENTENCING of Frank J. Muscarello.

IV. BEFORE THE SUPREME COURT OF THE UNITED STATES

*Frank J. Muscarello v. United States*, No. 96-1654

1. 4/18/97 PETITION of Frank J. Muscarello for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed.

2. 12/12/97 PETITION of Frank J. Muscarello for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit granted and case consolidated with No. 96-8837, *Donald E. Cleveland and Enrique Gray-Santana v. United States*.



**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF LOUISIANA**

INDICTMENT FOR VIOLATIONS OF THE FEDERAL CONTROLLED SUBSTANCES ACT AND THE FEDERAL GUN CONTROL ACT OF 1968

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| UNITED STATES OF AMERICA | CRIMINAL DOCKET NO. 95-002 |
| v. | SECTION: |
| FRANK J. MUSCARELLO, SR.<br>VINCENT J. PARDO<br>GARY R. MORGAN | VIOLATION:<br><br>21 USC § 841(a) (1)<br>21 USC § 846<br>18 USC § 924(c)(1)<br>21 USC § 853<br>21 USC § 2 |

The Grand Jury charges that:

COUNT 1

On or about the December 8, 1994, in the Eastern District of Louisiana, the defendants FRANK J. MUSCARELLO, SR., VINCENT J. PARDO, and GARY R. MORGAN did knowingly and intentionally combine, conspire, confederate and agree with each other to distribute a quantity of marijuana, a Schedule I drug controlled substance; in violation of Title 21, United States Code, Section 841 (a) (l), all in violation ox Title 21, United States Code, Section 846.

COUNT 2

On or about December 8, 1994, in the Eastern District of Louisiana, the defendants FRANK J. MUSCARELLO, SR., VINCENT J. PARDO, and GARY R. MORGAN did knowingly and intentionally distribute a quantity of marijuana, a Schedule I drug controlled substance, all in violation of Title 21, United

States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT 3

On or about December 8, 1994, in the Eastern District of Louisiana, the defendant FRANK J. MUSCARELLO, SR. did knowingly use and carry a firearm; that is, a Smith & Wesson, .38 caliber revolver, serial number 1J17140, during and in relation to the commission of a drug trafficking crime for which he may be prosecuted in a court of the United States, to wit: distribution of marijuana, in violation of Title 21, United States Code, Section 841(a)(1); all in violation of Title 18, United States Code, Section 924(c)(1).

NOTICE OF FORFEITURE

As a result of the foregoing offenses, the defendants FRANK J. MUSCARELLO, SR., VINCENT J. PARDO, and GARY R. MORGAN shall forfeit to the United States any and all property constituting or derived from any proceeds the said defendants obtained directly or indirectly as a result of the said violation and any and all property used or intended to be used in any manner or part to commit and to facilitate the commission of the violations alleged in Counts 1, 2 and 3 of this indictment, including, but not limited to the following:

1. A 1989 Ford F150 Pick-up truck, bearing Louisiana License plate number S170448, with Vehicle Identification Number (VIN) 1FTDF15N6KNA144, registered to the defendant FRANK J. MUSCARELLO, SR.

2. A 1993 GMC Sierra Club Coupe Pick-up truck, bearing Louisiana License Plate Number S206774, with Vehicle Identification Number (VIN) 2GTEC19K7P1546929, registered to the defendant GARY R. MORGAN.

3. If any of the above-described forfeitable property, as a result of any act or omission of the defendants:

(a) cannot be located upon the exercise of due diligence;



(b) has been transferred or sold to, or deposited with, a third person;

(c) has been placed beyond the jurisdiction of the Court;

(d) has been substantially diminished in value; or

(e) has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of said defendant up to the value of the above forfeitable property; all in violation of Title 21, United States Code, Sections 841(a)(1) and 853.

A TRUE BILL:

/s/ illegible
FOREPERSON

/s/ Eddie J. Jordan, Jr.
EDDIE J. JORDAN, JR.
UNITED STATES ATTORNEY
Bar Roll No. 1450

/s/ Jan Maselli Mann
JAN MASELLI MANN
Assistant United States Attorney
Chief, Criminal Division
Bar Roll No. 9020

/s/ John F. Murphy
JOHN F. MURPHY
Assistant United States Attorney

New Orleans, Louisiana
January 5, 1995

**PLEA AGREEMENT**

May 25, 1995

Honorable Marcel Livaudais, Jr.
United States District Judge
United States Courthouse
Eastern District of Louisiana
500 Camp Street
New Orleans, Louisiana 70130

*Re: United States v. Frank Muscarello*
*Criminal Docket No. 95-002 "E"*

Dear Judge Livaudais:

In compliance with the holding of *Bryan v. United States*, 492 F.2d 775 (1974), and with Rule 11 of the Federal Rules of Criminal Procedure, the Government wishes to acknowledge the following agreement between the Government and Frank Muscarello, the defendant, in the above-captioned proceeding. Defendant's undersigned counsel, J. Garrison Jordan and Ron S. Macaluso, have reviewed the terms of this agreement; J. Garrison Jordan and Ron S. Macaluso have been advised by the defendant that the defendant fully understands the terms of this agreement.

The defendant has agreed to plead guilty to all three counts in the indictment charging conspiring to distribute marijuana, in violation of Title 21, United States Code, Section 846; distribution of marijuana, in violation of Title 21, United States Code, Section 841(a)(1); and use of a firearm during a drug trafficking offense, in violation of Title 18, United States Code, Section 924(c)(1).

The defendant further understands that the maximum penalty defendant may receive should his plea of guilty be accepted is a minimum mandatory penalty of five years imprisonment and a maximum of 15 years imprisonment, and/or a fine of $750,000, or the greater of twice the gross gain to the defendant or twice the



gross loss to any person, under Title 18, United States Code, Section 3571.

It also is understood that the Court may order restitution to any victim in this case under the provisions of Section 3663 of Title 18, United States Code, if the Court finds it appropriate to do so. The defendant agrees that any restitution imposed will be non-dischargeable in any bankruptcy proceeding and that defendant will not seek or cause to be sought a discharge or a finding of dischargeability as to the restitution obligation.

Further, the defendant understands that a mandatory special assessment fee of $150 shall be imposed under the provisions of Section 3013 of Title 18, United States Code. This special assessment must be paid on the date of sentencing. Failure to pay this special assessment may result in the plea agreement being void.

The defendant further understands that the Court, in imposing a sentence of a term of imprisonment, may include as part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment for a period of up to three (3) years, pursuant to Title 18, United States Code, Section 3583. Supervised release is a period following release from prison during which defendant's conduct will be monitored by the Court or the Court's designee. Defendant fully understands that if defendant violates any of the conditions of supervised release that the Court has imposed, defendant's supervised release may be revoked and defendant may be ordered by the Court to serve in prison all or part of the term of supervised release.

The defendant understands that any discussions with defendant's attorney or anyone else regarding sentencing guidelines are merely rough estimates and the Court is not bound by those discussions. The defendant additionally understands the Court could impose the maximum term of imprisonment and fine allowed by law, including the imposition of supervised release.

The defendant hereby expressly waives the right to appeal his sentence on any ground including any appeal right addressed in

Title 18, United States Code, Section 3742 and the defendant further agrees not to contest his sentence in any post-conviction proceeding, including but not limited to a proceeding under Title 28, United States Code, Section 2255. The defendant, however, reserves the right to appeal the following:

(a) Any punishment imposed in excess of a statutory maximum, and

(b) Any punishment to the extent it constitutes an upward departure from the guideline range deemed most applicable by the sentencing court.

This plea agreement is predicated upon the fact that the defendant agrees to submit to interviews whenever and wherever requested by law enforcement authorities. The defendant understands he must be completely truthful. The defendant also agrees to appear before any Grand Jury or trial jury and to testify truthfully. The defendant understands if he is not truthful, this agreement will be null and void and defendant may be prosecuted for perjury or making false statements. The defendant agrees neither to implicate anyone falsely nor to exculpate or protect anyone falsely. The defendant further agrees to immediately advise the Government as to any person defendant believes to be violating the law and defendant agrees to assist the Government with regard to the investigation and prosecution of criminal conduct.

In the sole determination of the United States Attorney, should it be determined that the defendant has provided substantial assistance, the United States will file a motion to depart below the defendant's applicable guideline range and upon such a determination, the government will recommend to the court that the defendant be sentenced to a term of imprisonment of thirty-six (36) months.

The Government also agrees that any statements or testimony given by the defendant pursuant to questions asked by federal agents or prosecutors as a result of this agreement will not be used against the defendant nor will anything derived from the



statements or testimony be used against the defendant except for the purpose of impeachment. However, all parties understand that any statements or testimony given by the defendant can be used as leads or for any other reason against other persons. Further, the defendant fully understands that should he commit perjury or give false statements to federal agents, the statements and testimony can be used to prove those offenses, and he faces additional criminal charges.

The defendant agrees to forfeit and give to the United States prior to the date of sentencing any right, title and interest which the defendant may have in the assets listed in "Exhibit A" attached to this agreement and any assets or interest in assets, including but not limited to cash assets, negotiable instruments, securities, property or other things of value, including any and all property which has been transferred or sold to or deposited with any third party, known or unknown by the defendant for a period of not less than 10 years prior to the date of the signing of this agreement that were involved in, used in, intended for use in, or obtained through illegal drug dealing, as well as any asset, interest, or proceeds defendant received or could receive or cause to be received by a third party in the future, directly or indirectly, in whole or in part, from defendant's illegal activities.

The defendant further agrees to submit to interview whenever and wherever requested by law enforcement authorities regarding all assets within his possession or those assets transferred or sold to or deposited with any third party as outlined within the preceding paragraph. It is also understood that defendant will fully cooperate in providing any and all financial information and documentation, agrees to voluntarily execute a complete and thorough "Financial Statement," Form OBD-500 (attached), and to provide the attached list of documents. The defendant understands that information may be provided to a representative of any victim of this offense.

The defendant understands that the statements set forth above represent defendant's entire agreement with the Government;

there are not any other agreements, letters, or notations that will affect this agreement.

Very truly yours,

EDDIE J. JORDAN, JR.
UNITED STATES ATTORNEY

/s/ John F. Murphy
JOHN F. MURPHY
Assistant United States Attorney

/s/ J. Garrison Jordan _____ 5/25/95
J. GARRISON JORDAN Date
Attorney for the Defendant

_____ _____
RON S. MACALUSO Date
Attorney for the Defendant

/s/ Frank Mascarello _____ 5/25/95
FRANK MUSCARELLO Date
Defendant

* * *

EXHIBIT A

A 1989 Ford F-150 pickup truck, bearing Louisiana license plate number S170448, with Vehicle Identification Number (VIN)1FTDF15N6KNA144, registered to the defendant, Frank J. Muscarello, Sr.



[Filed May 25, 1995]

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF LOUISIANA**

UNITED STATES OF AMERICA CRIMINAL DOCKET
NO. 95-002
v. SECTION: "E"

FRANK J. MUSCARELLO, SR.
VINCENT J. PARDO

FACTUAL BASIS

Should this case proceed to trial the government would prove the following through competent evidence:

Prior to December 8, 1994, agents of the Drug Enforcement Administration (DEA) utilized an undercover cooperating individual (CI), who audio recorded conversations in which the defendant Frank Muscarello negotiated and arranged to deliver marijuana to the CI and a potential buyer. The "buyer" in fact was a DEA special agent working in an undercover law enforcement capacity.

At approximately 7:55 a.m. on December 8, 1994, the CI met the defendant Frank Muscarello at a graveyard on Highway 442 in Tickfaw, Louisiana. The CI introduced and undercover DEA special agent to Frank Muscarello and the UCA gave Frank Muscarello $2,400.00 as an advance payment for two pounds of marijuana. Frank Muscarello then departed in his Ford pick-up truck to pick up the marijuana for the undercover DEA agent.

At approximately 8:54 a.m., surveillance law enforcement agents observed Vincent Pardo leave his residence in a Ford Thunderbird and meet with Frank Muscarello at the Tickfaw Louisiana Town Hall. Frank Muscarello then departed the Town Hall and drove past the undercover DEA agent and the CI and motioned for them to follow Frank Muscarello in his Ford truck.

The DEA agent and the CI followed Frank Muscarello to an intersection of Highway 442 and Hebert Lane where defendant Frank Muscarello pointed to a green garbage bag on the side of the road. Frank Muscarello told the DEA agent that the marijuana was in the bag.

After the DEA agent picked up the marijuana the DEA agent once again met with Frank Muscarello and the DEA agent gave Frank Muscarello $7,200.00 for six (6) more pounds of marijuana. Mr. Muscarello departed the area and was observed by surveillance agents as he drove to Vincent Pardo's residence. Defendants Muscarello and Pardo then left the residence together and drove back to the location of the DEA agent.

Defendants Muscarello JM then took the CI and the undercover DEA agents to an area off Highway 442, on Herbert Lane, and JM removed green plastic bags from his vehicle, containing marijuana. The DEA agent took possession of the marijuana.

A total of approximately eight (8) pounds of marijuana was distributed by defendants Pardo and Muscarello with the assistance of a third defendant Gary Morgan. Payment for the marijuana and negotiations between the DEA agent and the defendant Frank Muscarello occurred in his Ford truck. A total of $9,600.00 was paid to the DEA agent by the co-conspirators to the distribution of marijuana.

Located inside the glove compartment of the defendant Muscarello's Ford truck was a loaded firearm which the defendant knowing possessed in his vehicle and carried for protection in relation the above described drug trafficking offense.

The DEA laboratory has tested and confirmed that the substance distributed was in fact marijuana, a Schedule I drug controlled substance.

Should this case proceed to trial the government would prove the following with the testimony of the undercover DEA agent and the cooperating individual. Tape recordings of the drug distribution would be offered as well as the testimony of surveillance officers that observed the distribution. Finally, a



DEA chemist would be called the confirm that the substance distributed was in fact marijuana.

/s/ J.L.F. Murphy
AUSA

/s/ J. Garrison Jordan
Attorney for Defendant Frank Muscarello

/s/ John Diguilo
Attorney for Pardo

/s/ Vincent J. Pardo

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF LOUISIANA**

| | |
|---|---|
| UNITED STATES OF AMERICA, | Criminal Action No. 95-002 |
| Plaintiff, | Section "E"(4) |
| v. | New Orleans, Louisiana |
| FRANK MUSCARELLO, SR. ET AL, | May 25, 1995 |
| Defendant. | |

REARRAIGNMENT
BEFORE THE HONORABLE MARCEL LIVAUDAIS, JR.,
UNITED STATES JUDGE

APPEARANCES:

| | |
|---|---|
| For the Government, | United States Attorney's Office<br>By: JOHN F. MURPHY, ESQ.<br>501 Magazine Street<br>New Orleans, Louisiana 70130 |
| For Frank Muscarello, | Seale, Macaluso, Daigle & Ross<br>By: J. GARRISON JORDAN, ESQ.<br>200 North Cate Street<br>Post Office Drawer 2787<br>Hammond, Louisiana 70404 |
| For Vincent J. Pardo, | Law Office of John E. DiGiulio<br>By: JOHN E. DIGIULIO, ESQ.<br>331 St. Ferdinand Street<br>Baton Rouge, Louisiana 70802 |

* * *



[2] PROCEEDINGS
(Thursday, May 25, 1995)

(Call to Order of the Court)

THE COURT: Good morning.

MR. MURPHY: Good morning, Your Honor.

MR. JORDAN: Good morning, Judge.

THE COURT: Won't you please be seated.

This is Criminal Action 95-002, *The United States versus Muscarello and Pardo*.

MR. MURPHY: Good morning, Your Honor. John Murphy on behalf of the United States.

MR. DIGIULIO: John DiGiulio on behalf of Vincent Pardo, Your Honor.

MR. JORDAN: And Your Honor, Garrison Jordan on behalf of Defendant Frank Muscarello.

THE COURT: Very well. And I'm told that this is to be a Rearraignment then?.

MR. MURPHY: Yes, Your Honor.

THE COURT: And Mr. Muscarello is to plead guilty perhaps to Counts 1, 2, and 3, am I correct?

MR. JORDAN: That's correct, Your Honor.

THE COURT: And Mr. Pardo to Counts 1 and 2, right?

MR. DiGIULIO: Yes, Your Honor.

THE COURT: Okay. We'll go first with Mr. Muscarello, if he's present.

[3] MR. JORDAN: He is present, Your Honor.

THE COURT: Okay. There was some confusion. I believe I was told that the plea agreement, I received a copy of it, but a substitute was to be made?

MR. MURPHY: Your Honor, there was an error in the maximum penalty, so, which your law clerk alerted me to and I have corrected those. The maximum penalties are, in fact, 15 years with a mandatory minimum five years on Count 3, a fine of $750,000 and a three year period of supervised release. That's the correct —

THE COURT: And so that was the change.

MR. MURPHY: And that has been changed.

THE COURT: It has been made on Page 1 then?

MR. MURPHY: Page 1 and the supervised release on Page 2.

THE COURT: All right.

Mr. Muscarello, before I accept your plea I have to ask you certain questions and you can certainly discuss them with your attorney before you answer them. I'll be glad to repeat them if necessary.

DEFENDANT MR. MUSCARELLO: All right, sir.

THE COURT: And I'll have to have your answers under oath so I'll ask that you be sworn.

* * *

[4] FRANK J. MUSCARELLO, SR., DEFENDANT, SWORN

* * *

THE COURT: You understand, of course, that all answers given under oath in open court, if not truthful, might later be the basis for a perjury or a false statement prosecution?

DEFENDANT MR. MUSCARELLO: Yes.



THE COURT: Have you taken any narcotic drugs or pills or medicines or consumed any alcoholic beverages in the past 24 hours?

DEFENDANT MR. MUSCARELLO: No, sir. I take regular medicine for my heart and stuff.

THE COURT: Other than the medication that is prescribed for you, have you taken any?

DEFENDANT MR. MUSCARELLO: That's right. No, nothing.

THE COURT: I ask that because I just want to make sure. Do you understand what this proceeding is about today?

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: Counsel, do you have any doubt as to your client's competency to plead at this time?

MR. JORDAN: No, sir.

THE COURT: Have you had a full opportunity to discuss this matter with your attorney?

[5] DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: Are you satisfied with the services of your attorney?

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: And you have read and understand this three count Indictment against you?

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: Do you understand that if I accept your guilty plea you would not be entitled to a trial or an appeal, and the Government would not be required to prove you guilty, because by pleading guilty you're giving up those rights?

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: And do you understand that if you were to maintain your plea of not guilty, you would have a right to be represented by an attorney, either one you chose for yourself or one appointed for you?

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: You would have a right to remain silent.

DEFENDANT MR. MUSCARELLO: Yes sir.

THE COURT: And at a trial the Government would be required to confront you with witnesses upon whose testimony it relies to obtain a conviction, and you could cross-examine those witnesses.

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: And at a trial you would be presumed [6] innocent until such time, if ever, that the Government overcame that presumption and established your guilt by competent evidence beyond a reasonable doubt.

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: And at a trial you could subpoena witnesses on your behalf.

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: Also, you could testify if you wanted to, but nobody could force you to testify.

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: And if you plead guilty and I accept your plea, you understand that you would waive your right to a trial and appeal, and the other rights I've just discussed. There would be no further trial. I would just simply enter a judgment of guilty and sentence you on the basis of the guilty plea.

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: Are you willing to waive and give up your right to a trial by jury or a judge?



DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: And you have discussed with your attorney these three counts. I'm going to just review them with you to make sure we understand each other. That Count 1 says that on or about December 8, 1994, you and others intentionally, knowingly combined and conspired and agreed to distribute a [7] quantity of marijuana. That's in Count 1.

In County 2, that the three of you did knowingly distribute a quantity of marijuana.

And Count 3 is that on that date you knowingly used and carried a firearm, a Smith & Wesson 38 caliber revolver. Those are the three counts that you have discussed with your attorney and you understand?

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: You understand those counts?

DEFENDANT MR. MUSCARELLO: Yes sir.

THE COURT: In the factual basis you talk about eight pounds.

Is that correct, Mr. Murphy?

MR. MURPHY: Your Honor, that's the quantity that the Government alleges and that's the total quantity the Government alleges.

THE COURT: And that's the quantity that would affect the guidelines?

MR. MURPHY: That's correct, Your Honor.

THE COURT: So, eight pounds brings the guidelines — well, a maximum sentence just by itself,what is the eight pounds?

MR. MURPHY: The statutory maximum would be five years; five years each for the conspiracy, five years for the distribution.

[8] THE COURT: Eight pounds. Now, if —

MR. MURPHY: For eight pounds.

THE COURT: For the eight pounds.

MR. MURPHY: The confusion that I had that has now been corrected is that the 20 years applies only when you have quantities in excess of 100 pounds.

THE COURT: All right. Well, I just wanted — since the Indictment just said "a quantity," I just wanted to make sure we understand we're talking about eight pounds.

MR. MURPHY: That's correct, Your Honor. And the Government sets that forth in its factual basis.

THE COURT: Yes. Well, did you, in fact, do the acts charged in the Indictment that we've just reviewed?

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: And the mandatory minimum sentence which I must impose on you is five years. Do you understand that this is a mandatory minimum sentence?

DEFENDANT MR. MUSCARELLO: Yes.

THE COURT: And the maximum possible sentence which could be imposed in the event of conviction as to Counts 1, 2 and 3, either on a plea of guilty or after trial is, as to Count 1, a period of imprisonment up to a maximum of five years and/or a fine of $250,000. To Count 2, the same, a period of imprisonment up to a maximum of five years and/or a fine of up to $250,000. And as to Count 3, a period of [9] imprisonment of five years and a fine of up to $250,000. Those three things are the maximum, do you understand that?

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: And you understand that should a period of imprisonment be ordered, you maybe placed on a term of supervised release up to a maximum of three years?

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: This is not a restitution question at all.



MR. JORDAN: No, Your Honor.

THE COURT: Do all Counsel agree that I've correctly explained the maximum sentence?

MR. MURPHY: Yes, Your Honor.

MR. JORDAN: Yes, Your Honor.

THE COURT: Well, do you understand that under the Sentencing Reform Act of 1984, the U.S.Sentencing Commission has issued guidelines for judges to follow. Have you discussed these guidelines with your attorney?

MR. JORDAN: Yes, sir, at length.

Say yes.

DEFENDANT MR. MUSCARELLO: Yes.

THE COURT: Have you discussed them with your attorney?

DEFENDANT MR. MUSCARELLO: Yes. Yes, sir.

THE COURT: Do you understand that I may or may not [10] decide to sentence you within the guidelines?

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: Do you understand that I could decide to impose a sentence on you that is greater or lesser than those determined by the guidelines, depending on what other circumstances I find?

DEFENDANT MR. MUSCARELLO: Yes, Your Honor.

THE COURT: And do you understand that I won't even know what the guidelines are until after the Probation Service has prepared them and given you a copy of them, to your attorney, and the Government a copy to give you opportunities to make corrections or objections or changes to them?

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: And then when I do get them, you understand that I could still decide to sentence you below them, within them, above them, depending on the facts that I may determine?

DEFENDANT MR. MUSCARELLO: Yes, Your Honor.

THE COURT: And in the copy of the plea agreement, I haven't seen the signed one, but I presume it's the same, in this plea agreement, you say or it is said, "The Defendant hereby expressly waives the right to appeal his sentence on any grounds including any appeal right addressed in Title 18, United States Code, Section 3742.

"And the Defendant further agrees not to contest his [11] sentence in any post conviction proceeding including, but not limited to, a proceeding under Title 28, United States Code, Section 2255.

"The Defendant, however, reserves the right to appeal the following: A. Any punishment imposed in excess of the statutory maximum. B. Any punishment to the extent it constitutes an upward departure from the guideline range deemed most applicable by the sentencing court."

You and your attorney have discussed this provision of the plea agreement and you understand it?

DEFENDANT MR. MUSCARELLO: Yes, Your Honor.

THE COURT: So, there is the plea agreement and if the signed copy is available I'll review it.

MR. MURPHY: Yes, Your Honor. I'm offering the plea agreement, and as the Court mentioned earlier, that's the same plea agreement that I had provided earlier except for the corrected statutory maximum penalties.

THE COURT: All right. I see where you have made the change on Page 1 and the three years on Page 2.

Do all of you agree that this plea agreement constitutes the entirety of the agreement you've made amongst yourselves?



MR. MURPHY: Yes, Your Honor. Although I would like to elaborate on one point. There is a paragraph in there that says that in the determination of the United States, if Mr. [12] Muscarello provides substantial assistance, the Government will move by way of filing a motion, asking that a sentence of 36 months by imposed.

THE COURT: Yes, I saw that. But it says in the sole discretion of the United States.

DEFENDANT MR. MUSCARELLO: Correct.

MR. MURPHY: And that determination has been made now, Your Honor. That, in fact, the assistance Mr. Muscarello has been — had provided already, in the view of the United States, and in the view of the U.S. Attorney, has risen to the level of substantial assistance.

THE COURT: Very well. Then though you may not have it typed and prepared now — or do you?

MR. MURPHY: We do, Your Honor.

THE COURT: Okay.

MR. MURPHY: And the Government would offer this.

THE COURT: And I'll accept it.

MR. MURPHY: It's a motion under seal that, in effect, puts that paragraph into effect. Mr.Muscarello understands that that's a motion made by the United States and that it's up to the Court to determine whether the motion will be granted or not.

THE COURT: Well, what Mr. Murphy just said, Mr. Muscarello, is that I could decide to ignore this if I wanted to. This does change the mandatory minimum and if I accept [13] it, I'm no — you wouldn't be necessarily concerned with that mandatory five years. I do not have to accept it, you understand?

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: I will review it and consider it, but I can tell you from my past experience, the Government is very stingy

about making letters like this and they don't just make them arbitrarily. And when they do, they mean what they say, and to the best of my knowledge, I've never refused one. But I still have to review it. You understand that?

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: Well, has anyone connected with the Government or anybody connected with any law enforcement agency or anybody made any prediction or prophecy or promise to you as to what your sentence would be, other than the recommendation?

DEFENDANT MR. MUSCARELLO: No, sir.

THE COURT: Now, the Government provided me with a factual basis which I've read and I can ask the Government to read it over or we could just file a copy of it in the record, if you all would sign it.

MR. MURPHY: Your Honor, I have a copy signed by all individuals, I guess, except for Mr. Pardo. He needs to sign that.

THE COURT: That same factual basis will apply to Mr. [14] Pardo, so —

DEFENDANT MR. MUSCARELLO: Sure.

MR. MURPHY: It does, Your Honor.

THE COURT: Yes.

MR. MURPHY: And his attorney will sign it, I just didn't see —

THE COURT: All right. Well, instead of — if everybody is in agreement, I'll let that file be filed into the record without the necessity of it being read now.

So, Mr. Muscarello, do you understand the Government's evidence and do you agree that that's what you did?

DEFENDANT MR. MUSCARELLO: Yes, sir. Yes, sir.

THE COURT: Because I find that the plea is knowledgeable and voluntary and has a basis in fact that contains all the elements



of the crime, I will accept your guilty plea and the accompanying plea agreement and enter a judgment of guilty on your plea.

I'm going to order the customary pre-sentence report, which I'm sure your attorney has explained or will explain to you, and schedule sentencing for — it's hard to believe, is it really that — August 16, 1995 at 9:00 a.m. The year sure goes by in a hurry.

The Defendant is on bond and I've had no request that he be incarcerated. In other words, everybody seems to be [15] agreeable that he may remain on the present bond, am I correct?

MR. MURPHY: That's correct, Your Honor.

THE COURT: Very well, he may remain free on the present bond.

MR. MURPHY: Your Honor, I have one more matter to file in connection with Mr. Muscarello. Pursuant to this plea agreement, he has agreed to forfeit his vehicle and has signed a consent decree for forfeiture. And I would offer that along with an order of forfeiture at this time.

THE COURT: Being no objection, I will receive it for the record.

MR. JORDAN: No objection.

THE COURT: Anything further on this issue?

MR. MURPHY: No, Your Honor.

MR. JORDAN: No, Your Honor.

THE COURT: Thank you.

* * * * *

(Whereupon the portion of the Hearing concerning Mr. Muscarello was then concluded)

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF LOUISIANA**

| | |
|---|---|
| UNITED STATES OF AMERICA, | Criminal Action No. 95-002 |
| Plaintiff, | Section "E"(4) |
| v. | New Orleans, Louisiana |
| FRANK J. MUSCARELLO, SR., | April 10, 1996 |
| Defendant. | |

MOTION TO QUASH AND/OR MOTION TO DISMISS
BEFORE THE HONORABLE MARCEL LIVAUDAIS, JR.,
UNITED STATES JUDGE

APPEARANCES:

| | |
|---|---|
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* * *



[2] PROCEEDINGS
(Wednesday, April 10, 1996)

(Call to Order of the Court)

THE COURT: Good morning.

MR. MURPHY: Good morning, Your Honor.

MR. JORDAN: Good morning, Your Honor.

THE COURT: Won't you please be seated.

We have Criminal Action 95-002, *The United States versus Frank J. Muscarello*.

Would Counsel make their appearance for the record, please?

MR. MURPHY: Good morning, Your Honor. John Murphy on behalf of the United States.

MR. JORDAN: Good morning, Your Honor. Garrison Jordan for the Defendant, Frank Muscarello, who also appears in Court.

THE COURT: This is a Motion to Quash or Dismiss Count 3 of the Indictment?

MR. JORDAN: Yes, sir.

THE COURT: All right. You may proceed, sir.

MR. JORDAN: Thank you, Your Honor. Your Honor, we had brought this motion pursuant to Rule 12(b)(2) of the Federal Rules of Criminal Procedure. I don't believe there is any procedural objection to bringing the motion by the Government.

[3] THE COURT: No, the motion is properly before the Court.

MR. JORDAN: All right. Thank you, Your Honor.

THE COURT: I don't think there's any dispute about that.

MR. JORDAN: Your Honor, I don't think the facts are in dispute either regarding the weapon involved.

THE COURT: And as a matter of fact, as I read this and as I understand the case, both from the memoranda Counsel has supplied and from the Pre-trial Order, the Government effectively concedes, or maybe my words aren't right, that Mr. Muscarello did not use the weapon. So, this is just a question of did he carry it. And your motion strikes the fact that the Bailey — he didn't carry it, as Bailey should be interpreted from it.

MR. JORDAN: Correct. And that is our position, Your Honor. The Government goes to great lengths to say that Bailey does not apply and that Mr. Muscarello, in fact, did carry the weapon, basically, because it was located in the vehicle. Our position on that is that Bailey is applicable. It was — the decision was rendered after the plea was entered to by Mr. Muscarello. We think that Bailey applies and therefore the statute, 18:924(c)(l) is inapplicable or Mr. Frank Muscarello did — the plea was not to a crime, based on the Bailey decision.

[4] We also, it is our position that Bailey, the rationale of Bailey should apply to the carry prong also in this situation, that a gun that is locked in a glove compartment does not constitute carrying. The Government is seeking to say that constructive possession of a gun in a vehicle constitutes carrying. It is our position that the Bailey decision which says active employment should be used as a test to determine whether someone used a weapon, should also be used in the carrying aspect, because both of them are related to in and during relation of a narcotics offense or drug trafficking offense.

The gun was not easily accessible. It was locked in the glove compartment. Therefore, we say Bailey applies and that the Count 3 should be quashed and/or dismissed.

THE COURT: Thank you, sir.

MR. JORDAN: Thank you, Your Honor.

THE COURT: Mr. Murphy?

MR. MURPHY: Your Honor, the Government agrees that this is a carry case. In the Indictment the Defendant was charged under both use and carry. And although Bailey limits use under



924(c), it leaves completely intact the carry prong. And the Government has cited a Fifth Circuit case that seems to be right on point. It is cited in the brief, *United States* —

THE COURT: Is that *Pinedo Arturo* (phonetic)?

[5] MR. MURPHY: Yes, sir.

THE COURT: Yes, but that proceeded Bailey.

MR. MURPHY: That — but —

THE COURT: And that case said carry, or whatever word, in relation to.

MR. MURPHY: And in this case, Your Honor, we do have in relation to. In the factual basis agreed to by both parties, the —

THE COURT: Yes, but that was prepared by the Government.

MR. MURPHY: It was agreed to by both the Defense and signed by the Defendant himself —

THE COURT: That was prepared —

MR. MURPHY: — and the Government.

THE COURT: Well, that was prepared for a guilty plea thing.

Did you read Paragraph 16. I believe it is, of the Pre-sentence Report? Do you have it?

MR. MURPHY: I can check the —

THE COURT: Well, I'll read it for you. It's Paragraph 16 of the Pre-sentence Report. "As to the weapon, Muscarello does not deny his possession of the pistol. The pistol was in the glove compartment of his truck where is had been for a long period of time. He denies any conscious decision to carry the gun in relation to the marijuana sale, [6] and stated that he carried it in relation to his job with the Tangipahoa Parish Sheriff's Office, as a bailiff at the courthouse in Amite.

MR. MURPHY: Your Honor, that is —

THE COURT: Presumably, as a long employment history in the law enforcement, he was the Chief of Police. And I would imagine the Chief of Police carried it in the glove compartment too. So, I'm of the opinion that this Pre-sentence Report, with further analysis by the probation officer, discussing the matter with everybody, that Mr. Muscarello carried that gun in the glove compartment of his car as — and had been doing so for a long period of time, and he carried it for his job duties.

MR. MURPHY: Your Honor, if I may address that point. In the factual basis he does say that he carried it in —

THE COURT: But he — the factual basis was prepared by your office for the limited purpose of coming — or for a guilty plea. The Pre-sentence Report is a much more thorough and analytical document.

MR. MURPHY: Well, Your Honor, the Government —

THE COURT: So, I disagree.

MR. MURPHY: Okay. May I simply just say for the record, Your Honor, that it's the Government's position that defendants often times try and present the most favorable side of their case to a probation officer. But when looking at [7] whether or not a provident plea has been entered as to each and every element, the factual basis really should be the controlling document. And there was no dispute that the —

THE COURT: Not the way it was prepared. I don't —

MR. MURPHY: And Your Honor, it's the Government's position, there is no dispute that, in fact, he agreed that he carried the weapon for his protection in relation to the drug trafficking offense.

THE COURT: Yes, but those typewritten words were put in by your office.

MR. MURPHY: Well, Your Honor, I would —

THE COURT: I just disagree with you.

MR. MURPHY: I would —



THE COURT: I don't care what the factual basis says. In fact, grammatically, imperfect anyway.

MR. MURPHY: Your Honor, the only other point —

THE COURT: But that's not your fault.

MR. MURPHY: The only other point I would make is that the weapon was close to him. It was within —

THE COURT: Because he was outside the car when he was arrested, wasn't he?

MR. MURPHY: He — when be was arrested, but he traveled to the point in the vehicle where the gun was —

THE COURT: Well, if he wanted to use the weapon when the cops came up or whatever — the cops didn't come up, you [8] had undercover people. He would have unlocked the glove compartment and blasted away.

MR. MURPHY: Well, Your Honor, the only —

THE COURT: He's out of the car. He gets arrested. "Have you got a gun?"

"Yes, it's in the glove compartment."

They asked somebody else, "Have you got a gun?"

"Yes, it's" wherever it was, a 9 millimeter pistol. The Government doesn't even choose to do anything about that. They do something in Muscarello's case, and then hit me with a very strong 5K letter saying, oh, yes, the guidelines are six to 12, so 12 plus 60, that's 72 months. You hit me with a 5 letter saying cut him down to 36 months. Why? Is that because you felt you treated him unfairly —

MR. MURPHY: No, Your Honor.

THE COURT: — as opposed to the other one?

MR. MURPHY: That was because we received substantial assistance regarding Co-defendant Pardo.

THE COURT: Well, why didn't you indict the other guy?

MR. MURPHY: And —

THE COURT: Why didn't you include the other guy in Count 3?

MR. MURPHY: The reason we didn't charge Mr. Pardo with the gun is we did not recover the gun at the point of the [9] arrest or the point of the drug activity. A gun, some time later, a number of hours later, was recovered and we could not, in good faith, link it —

THE COURT: Well, he wasn't arrested at the scene, was he?

MR. MURPHY: The gun — he was not arrested at the scene and the gun was recovered later.

THE COURT: You followed him home and you got him?

MR. MURPHY: In another location. And we could not, in good faith, establish that Mr. Pardo's weapon —

THE COURT: Well, but that's beside the point anyway.

MR. MURPHY: — was part of the — of the deal.

THE COURT: That's fine.

MR. MURPHY: Your Honor, the Government would simply say that we feel that this case clearly meets the elements of Pinedo, which is not affected by Bailey.

THE COURT: Pinedo preceded Bailey. And one of the words, your own words, of Pinedo, Criteria Number 3 in Pinedo "The operator of the vehicle knowingly possessed the firearm during and in relation to a drug trafficking — a drug trafficking crime.

MR. MURPHY: And that's conceded.

THE COURT: That's the third element of Pinedo.

MR. MURPHY: That's conceded by the Defense.

THE COURT: But that's not conceded by the Defendant [10] in a piece of paper you give him at the time of a guilty plea, to sign and — well, I don't agree with you, sir.



MR. MURPHY: Okay. Well, Your Honor, that's really the totality of the Government's point.

THE COURT: Well, I understand.

MR. MURPHY: That it is undisturbed by Bailey. That it meets the elements of Pinedo. And that it was a carry. And the Government would ask that the Court not to strike this. And we do not think Mr. Muscarello was treated unfairly. He did provide substantial assistance regarding Co-defendant Pardo. Pardo pled, in part, I think, or substantially because of the assistance Mr. Muscarello provided, and it's proper that he receive that credit.

Mr. Pardo is not charged with the gun because we couldn't establish he had a gun at the time of the offense.

THE COURT: That has nothing to do with this, truly. I was just asking you out of curiosity.

MR. MURPHY: That was the — and I think that's sound prosecutorial decision making on the part of these two Defendants.

THE COURT: Well, I understand your position and your argument. And it's well stated and well placed, I just happen to disagree with it.

Thus, I'm going to grant the motion and I will assign written reasons which I've prepared almost and in final shape [11] now and I was just waiting until this argument. And I will submit or give those written reasons today.

Now, let me ask you this: I have the Pre-sentence Report, which I've had for a long time. Is there any reason we need to delay the sentence?

MR. MURPHY: I would ask that, Your Honor. And the reason I would is there is a third defendant, Mr. Morgan, who has an interlocutory appeal with the Fifth Circuit.

THE COURT: That has been there a long time, hasn't it?

MR. MURPHY: I talked with the attorney in my office who is handling the case, Rich Westling, yesterday. He advised me that he anticipate a ruling from the Fifth Circuit within a month.

THE COURT: Your check is in the mail.

MR. MURPHY: And it was argued several months ago.

THE COURT: I know.

MR. MURPHY: And —

THE COURT: Okay. Well, I'm — I just asked. It seems to me I've got all the paperwork I need. We don't need a supplemental pre-sentence report because Counts 1 and 2 are covered by the guidelines and this Count 3 is really not covered by guidelines. It's just a statutory, mandatory, on top.

MR. MURPHY: We would ask that —

[12] THE COURT: So, I'm — I've got a pre-sentence report here that says six to 12 months.

MR. MURPHY: The sentencing right now, Your Honor, is set for some time in the future. We'd like to keep it there.

THE COURT: Now, I'm not trying to push it on you. I just asked why. It isn't logical. I mean, I could do it right now, you know. If that's — I can understand your position if you want to wait for the rest of it. No one has been sentenced, right? Morgan is on appeal. Pardo has not been sentenced?

MR. MURPHY: That's correct.

THE COURT: And neither has Mr. Muscarello?

MR. MURPHY: That's correct, Your Honor.

THE COURT: Well, if you — well, I'll put it this way, if you all change your mind and want me to do the sentencing, I'm prepared to do it right now, today, or whatever you say.

MR. MURPHY: Your Honor, we would ask for the delay.



THE COURT: I can understand because of the other Defendants, the same picture, so I do understand that. But if you change your mind, let me know.

MR. MURPHY: And Your Honor, I just would —

THE COURT: I would assume, also, you're — since now, that Count 3 is out, you may appeal that or you may wait until sentencing to appeal it, or whatever. You have a [13] guideline factor and your 5K letter — well, I guess since the guidelines are what they are, they're practically meaningless. But you're going to also present the 5K for my consideration on a six to 12 month guideline?

MR. MURPHY: Your Honor, obviously, if this ruling stands, it would affect the recommendation.

THE COURT: Well, that's —

MR. MURPHY: However, the Government would maintain that Mr. Muscarello has provided substantial assistance. We don't change our recommendation in that regard.

THE COURT: I understand.

MR. MURPHY: But it would obviously be of a different —

THE COURT: Well, in other words, what you could — might reasonably interpret if he's going to change it so that you would say the bottom of the guidelines rather than step below the guidelines. And that the guidelines as they stand now, if there doesn't seem to be any objection to them, six months.

Well, let me know what you want me to do.

Anybody have anything else for the record at this time?

MR. JORDAN: No, Your Honor. No.

MR. MURPHY: No, Your Honor.

THE COURT: Thank you. We'll stand in recess then.

[14] MR. MACALUSO: Just add this. Ron Macaluso, also the Defendant, Your Honor.

THE COURT: Yes?

MR. MACALUSO: We intend — Mr. Muscarello intends continue to cooperate and testify if needed by — on request of the Government.

THE COURT: Oh, that's right. We have — didn't all three plead guilty?

MR. MURPHY: No.

THE COURT: Okay.

MR. MURPHY: What — one has not pled, Mr. Morgan.

THE COURT: I see. That's —

MR. MURPHY: He's got an appeal with the Fifth Circuit.

THE COURT: Now, I see now about the sentencing.

MR. MACALUSO: The purpose of the motion was not to get out of the plea agreement, but other than —

THE COURT: Okay.

MR. MACALUSO: But other than to raise the legal issue that Your Honor has addressed. So, for the Government's information and Your Honor's information, we still intend to cooperate and testify as called upon.

THE COURT: All right.

MR. MACALUSO: Thank you.

THE COURT: Thank you very much.

[15] MR. JORDAN: Thank you, Your Honor.

MR. MURPHY: Thank you, Your Honor.

THE COURT: Court is in recess.

* * * * *

(Whereupon the Hearing was then concluded)



**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF LOUISIANA**

| | |
|---|---|
| **UNITED STATES OF AMERICA** | **CRIMINAL ACTION NO. 95-2** |
| **versus** | |
| **FRANK J. MUSCARELLO** | **SECTION: "E"** |

**RULING ON**
**DEFENDANT'S MOTION TO QUASH**
**AND/OR DISMISS COUNT 3 OF THE INDICTMENT**

Entered on April 10, 1996

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(Found in the Appendix to the Petition for Certiorari at 8a-11a)

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF LOUISIANA**

| | |
|---|---|
| **UNITED STATES OF AMERICA** | **CRIMINAL ACTION** |
| **versus** | **NO. 95-2** |
| **FRANK J. MUSCARELLO** | **SECTION: "E"** |

**RULING ON GOVERNMENT'S MOTION REQUESTIONING RECONSIDERATION OF "QUASH AND/OR DISMISSAL" ORDER**

Entered on May 6, 1996

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(Found in the Appendix to the Petition for Certiorari at 12a-13a)



**UNITED STATES COURT OF APPEALS**
**FIFTH CIRCUIT**

UNITED STATES of America,
Plaintiff-Appellant,

v.

FRANK J. MUSCARELLO,
Defendant-Appellee.

No. 96-30591

**OPINION OF THE COURT**

Decided February 13, 1997

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(Found in the Appendix to the Petition for Certiorari at 1a-7a)

**SUPREME COURT OF THE UNITED STATES**

No. 96-1654

FRANK J. MUSCARELLO,

Petitioner,

v.

UNITED STATES

**ORDER ALLOWING CERTIORARI.**

Filed December 12, 1997

The Petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. This case is consolidated with No. 96-8837 - *Donald E. Cleveland and Enrique Gray Santana v. United States* and a total of one hour is allotted for oral argument. The briefs of petitioners are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, January 23, 1998. The brief of the Solicitor General is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 20, 1998. Reply briefs, if any, are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 18, 1998. Rule 29.2 does not apply.

December 12, 1997

(5)

No. 96-1654

Supreme Court, U.S.
FILED
JAN 23 1998
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

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FRANK J. MUSCARELLO,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**On Writ of Certiorari to the United State Court of Appeals for the Fifth Circuit**

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## BRIEF FOR PETITIONER

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34pp

## QUESTION PRESENTED

Whether 18 U.S.C. § 924(c)(1), which imposes a five-year prison term upon anyone who "carries" a weapon during and in relation to any drug-trafficking crime, is violated when a defendant knowingly possesses a firearm in the locked glove compartment of a truck, but could not readily access the firearm during the commission of the underlying crime.

## PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit were Frank J. Muscarello, as Defendant-Appellee, and the United States of America, as Appellant.



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## BRIEF FOR PETITIONER

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### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 106 F.3d 636, and is reprinted at pages 1a-7a of the appendix to the petition for certiorari. The opinion of the United States District Court for the Eastern District of Louisiana, granting petitioner's motion to quash or dismiss count 3 of the indictment against him, is not officially reported, although it is available at 1996 WL 173374, and is reprinted at pages 8a-11a of the appendix to the petition for certiorari. The district court's opinion denying the government's motion for reconsideration is unreported; it is reprinted at pages 12a-13a of the appendix to the petition for certiorari.

### JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 13, 1997. The petition for a writ of certiorari was filed on April 18, 1997. On December 12, 1997, this Court granted the petition in this case and consolidated it with *Cleveland v. United States*, No. 96-8837. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1994).

### STATUTORY PROVISION INVOLVED

Section 924(c)(1) of Title 18, United States Code, provides:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or

firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

## STATEMENT

1. On December 8, 1994, petitioner Frank J. Muscarello was arrested by federal agents for violation of federal drug statutes. At the time of his arrest, petitioner acknowledged to the arresting officers that he had a .38 caliber handgun located in the locked glove compartment of his truck. Pet. App. 8a.

2. On May 25, 1995, pursuant to a plea agreement (*see* J.A. 6-10), petitioner pleaded guilty to conspiracy to distribute marijuana and distribution of marijuana. *See* 21 U.S.C. §§ 841(a)(1), 846 (1994). Petitioner also pleaded guilty to count 3 of the indictment against him, which charged him with "using and carrying" a firearm in relation to those crimes, pursuant to 18 U.S.C. § 924(c)(1) (1994). J.A. 3-5; Pet. App. 2a, 9a, 12a. In pertinent part, the factual basis for petitioner's guilty plea, which was prepared by the government and signed by petitioner's lawyer, was the following:

> Located inside the glove compartment of the defendant Muscarello's Ford truck was a loaded firearm which the defendant knowing possessed in his vehicle and carried for protection in relation the above described drug trafficking offense. [*sic*]

J.A. 12; Pet. App. 2a, 9a, 12a. It was no surprise that petitioner had a gun in his locked glove compartment at the time of his arrest: Since 1954, petitioner had held a variety of law-enforcement positions, including constable, chief of police, and — at the time of his arrest



— a bailiff in the 21st Judicial District Courthouse, employed by the Tangipahoa Parish Sheriff's office. Pet. App. 3a, 10a. According to the pre-sentence report, the gun had "been [in the glove compartment] for a long period of time" before petitioner's arrest. Pet. App. 13a.

3. After his guilty plea, but prior to sentencing, this Court, on December 6, 1995, decided *Bailey v. United States*, 516 U.S. 137 (1995). In *Bailey*, this Court held that the term "uses . . . a firearm" in section 924(c)(1) must be given its ordinary and natural meaning, as understood in the context of that statute — not "possession alone" or "mere possession" but "active employment of the firearm." *Id.* at 144.

4. In view of *Bailey*, petitioner, on March 8, 1996, filed a motion to quash or dismiss count 3 of the indictment, pursuant to FED. R. CRIM. P. 12(b)(2). The government conceded that, after *Bailey*, petitioner's conviction "could no longer rest on the previously valid, alternative basis for his conviction, i.e. that he 'used' the firearm in connection with the drug deal."[1] The government maintained, nonetheless, that petitioner had still "carried" the gun, as he had acknowledged by his guilty plea. Pet. App. 9a.

5. On April 11, 1996, the district court granted petitioner's motion and dismissed count 3 of the indictment against him. Pet. App. 11a. While noting the "not very eloquen[t]" factual basis prepared by the government for petitioner's guilty plea hearing (Pet. App. 9a), the district court relied on additional facts, found in the pre-sentence report prepared by the United States Probation Office, that established that "defendant did not knowingly possess the firearm *in relation* to a drug-trafficking crime," but "in furtherance of his job requirements and not for active employment in the charged transaction." Pet. App. 10a.

6. On April 19, 1996, the government filed a motion for reconsideration in the district court. The government urged that petitioner, by admitting to the government's factual basis for his guilty plea, had "acquiesced in and admitted to" carrying a firearm in

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[1] Gov't C.A. Br. at 8 n.2.

relation to a drug-trafficking offense. Pet. App. 12a. The district court denied this motion on May 7, 1996, noting, *inter alia*, that "[t]his is true, but the Court notes that this is a pre *Bailey* composition by the government and a pre *Bailey* consideration by defendant and his counsel." *Id.* The district court thus concluded that petitioner "did *carry* a firearm in the locked glove compartment of his vehicle, but not *in relation* to the commission of a drug trafficking crime." Pet. App. 13a.

7. On June 7, 1996, the government appealed the district court's determination to the Fifth Circuit. The Fifth Circuit reversed, *per curiam*, on February 13, 1997. In reversing, the court of appeals held that the district court had committed "two errors of law" in reaching its decision to dismiss count 3 of the indictment. Pet. App. 5a.

a. The first error identified by the court of appeals involved the question of whether *Bailey*, which dealt with the "use" prong of section 924(c)(1), had any relevance to a conviction under the "carries a firearm" prong of that statute. Noting the district court's characterization of the factual basis for petitioner's guilty plea as "a 'pre-*Bailey* composition by the government and a pre-*Bailey* consideration by Defendant and his counsel'" (Pet. App. 5a), the court of appeals called the district court's reliance on *Bailey* "a legal non sequitur"; since "*Bailey* did not address the *carrying* facet of § 924(c), our prior jurisprudence on carrying remains applicable." Pet. App. 4a-5a. Following Fifth Circuit cases that were decided prior to *Bailey*, the court of appeals held that petitioner's conviction could be upheld so long as the firearm was "knowingly possessed" anywhere in petitioner's truck: "[T]he 'carrying' requirement of § 924(c) is met if the operator of the vehicle knowingly possesses the firearm in the vehicle during and in relation to a drug trafficking crime." *Id.* (citations and quotations omitted).

b. The second legal error identified by the Fifth Circuit involved not the "carry" aspect of section 924(c)(1), but the "in relation to any . . . drug trafficking crime" aspect of that statute. The district court, relying on the probation office's pre-sentence report, had held that petitioner's possession of the gun was "in furtherance of his job requirements," not "*in relation* to a drug trafficking crime." Pet.



App. 10a. The court of appeals held that the district court should not have relied upon petitioner's "self-serving declaration" in the pre-sentence report "regarding his subjective intent in possessing the pistol in the truck." Pet. App. 5a. According to the court of appeals, the district court erroneously "allowed the PSR to supplant the formal plea agreement." *Id.*

c. In conclusion, the Fifth Circuit noted that *Bailey* "did nothing to invalidate our pre-*Bailey* 'carrying' jurisprudence, at least as to those instances of drug trafficking that involve the use of motor vehicles in which firearms are possessed." Pet. App. 5a-6a. Thus, the court concluded, "the fact that the glove compartment was locked does not prevent conviction." Pet. App. 6a.

## SUMMARY OF ARGUMENT

The phrase "carries a firearm," 18 U.S.C. § 924(c)(1), means "to bear the firearm upon the person," or at its broadest, "to be immediately accessible for use as a weapon when in a vehicle." Because petitioner's firearm was neither, his conviction under section 924(c)(1) should be reversed.

I. As ordinarily understood, the phrase "carries a firearm" means "to bear the firearm upon the person." This construction is most consistent with the text, context, and history of section 924(c)(1), and is further supported by the rule of lenity.

Although dictionaries provide a wide choice of definitions for the word "carry," its specific meaning becomes apparent when considered in the context of section 924(c)(1), which uses the term "carries a firearm." The ordinary and natural understanding of the verb "carry," when its direct object is "a firearm," is "to bear on one's person." This construction of section 924(c)(1) is also supported by the previously stated views of members of this Court (*see, e.g.*, *Bailey v. United States*, 516 U.S. 137, 146 (1995); *Smith v. United States*, 508 U.S. 223, 236 (1993); *id* at 245-46 (Scalia, J., joined by Stevens and Souter, JJ., dissenting); *United States v. McFadden*, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting)), and confirmed by ordinary linguistic principles.

Thus, "carry" cannot mean either "possess," as the Fifth Circuit in this case held, or "transport," as the government has previously suggested. As it has in many other firearms statutes, Congress might have chosen different and broader language (like "possess" or "transport") to give a different meaning to section 924(c)(1), but it did not. Instead, Congress reserved the harsh mandatory minimum sentence of section 924(c)(1) for only the most dangerous firearm-related conduct — "active employment" of a weapon ("use") or bearing a weapon on one's person ("carrying") during the commission of a crime. Consistent with this sensible understanding, Congress has typically penalized less-dangerous firearm conduct, such as "possession" or "transportation," with far less Draconian sentences.

Additionally, while the legislative history of section 924(c) is sparse, what does exist supports petitioner's construction. The repeated examples in the legislative history of what constitutes "carrying a firearm" strongly point towards petitioner's proposed construction. Finally, this construction, which is at the very least a reasonable one, is compelled by the rule of lenity.

Under this construction of "carries a firearm," petitioner's conviction must be reversed. The firearm in this case was located in the locked glove compartment of petitioner's truck, and was never borne on petitioner's person during and in relation to the drug crimes for which he was convicted.

ii. Even if this Court should decline to accept petitioner's proposed construction of section 924(c)(1), it should, at a minimum, reject the government's and Fifth Circuit's constructions and hold that a firearm in a vehicle must at least be immediately accessible for use as a weapon in order to be "carried." This construction is supported by decisions of the Second, Sixth, and Ninth Circuits. While this construction is not quite as faithful to the statutory text as the "bears upon one's person" construction, it is still far more consistent with the statutory language than the broad constructions given by the Fifth Circuit in this case, or proposed by the government here. Additionally, this construction would prevent "carrying" from collapsing into mere "possession" or "transportation," and under the rule of lenity, it is still far preferable to the broader constructions.



Petitioner's conviction would also have to be reversed under this intermediate construction of the statute. A firearm located in a locked glove compartment is not, by definition, "immediately accessible."

III. Neither the construction of the statute advocated by the government, nor the one adopted by the Fifth Circuit in this case, can be squared with the text and context of section 924(c)(1), or its history.

As noted above, "carry" cannot mean "transport" (as advocated by the government) or "knowingly possess" in a vehicle (as stated by the Fifth Circuit below): As evidenced by other firearms provisions, Congress might have chosen broader language such as "transports" or "possesses," but it did not. Moreover, the government's and Fifth Circuit's approaches would distort the language of the statute; indeed, the Fifth Circuit admits that under its approach, the statutory language "carries a firearm" takes on a "different meaning" when a vehicle is involved. Such an approach would violate every coherent principle of statutory construction, present courts with impossible line-drawing problems, and cause absurd results. Finally, even if the government's or the Fifth Circuit's constructions could be said to be "reasonable," neither construction is the "unambiguously correct" understanding of the statute. Accordingly, the rule of lenity would compel the adoption of one of the two narrower constructions of the statute proposed by petitioner.

## ARGUMENT

Section 924(c)(1) of Title 18, United States Code, imposes a mandatory five-year prison term when the defendant "uses or carries a firearm" "during and in relation to any crime of violence or drug trafficking." In *Bailey v. United States*, 516 U.S. 137 (1995), this Court held that "uses" in section 924(c)(1) requires "active employment" of the firearm. The question presented in this case is: What does it mean to "carr[y] a firearm"?

Petitioner submits that the natural understanding of the term "carries a firearm" is "bears a firearm on one's person." At its broadest, "carries a firearm" might admit of a definition requiring the firearm to be not necessarily on the defendant's person, but at least

immediately accessible to the defendant, so that it is ready for "use." In any event, neither the government's proffered definition ("transports") nor the construction adopted by the Fifth Circuit below ("knowingly possesses" in a motor vehicle) can be squared with ordinary principles of statutory construction. And in all events, since the narrower constructions of section 924(c)(1) are at least as reasonable as the government's and Fifth Circuit's constructions, the rule of lenity would require the narrower ones to prevail. Petitioner's conviction should be reversed.

## I. A PERSON "CARRIES A FIREARM" BY BEARING IT UPON HIS PERSON

The term "carries a firearm," as it is ordinarily understood, means "to bear the firearm upon the person." This interpretation of section 924(c)(1) is supported by the statute's text and context, its legislative history, and ultimately, by the rule of lenity.

1. As this Court has so often explained, "[t]he task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). *See also, e.g., Bailey v. United States*, 516 U.S. at 144-45; *Smith v. United States*, 508 U.S. 223, 228 (1993); *Pennsylvania Public Welfare Dep't v. Davenport*, 495 U.S. 552, 557-58 (1990). "[I]n this case, it is also where the inquiry should end, for where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. at 241, quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

Section 924(c)(1) imposes an enhanced sentence on anyone who, "during and in relation to any . . . drug trafficking crime . . . carries a firearm." 18 U.S.C. § 924(c)(1). Because the statute contains no special or technical definition of the term "carries a firearm," it must be construed in accordance with "its 'ordinary or natural' meaning." *Bailey v. United States*, 516 U.S. at 145, quoting *Smith v. United States*, 508 U.S. at 228. *See also, e.g., Chapman v. United States*, 500 U.S. 453, 462 (1991); *Perrin v. United States*, 444 U.S. 37, 42 (1979).



In order to determine the "ordinary or natural meaning" of the term "carries a firearm," it is appropriate to start with the dictionary definition of "carry." *See, e.g., Bailey v. United States*, 516 U.S. at 145; *Smith v. United States*, 508 U.S. at 228-29. But here, the dictionary by itself cannot completely answer the question. For example, the principal dictionary cited by the government in opposing certiorari (Opp. 6, 10) lists 37 separate definitions for "carry" — 29 when it is used as a transitive verb (*i.e.*, a verb requiring an object), and eight more when it is used as an intransitive verb. *Webster's Third New International Dictionary* 343 (1976). Similarly, the dictionary employed by this Court in *Bailey v. United States*, 516 U.S. at 145, offers 32 different definitions for "carry." *See Webster's New International Dictionary of the English Language* 412 (2d ed. 1950). Another leading dictionary contains 31 different definitions of "carry." *See Webster's II New Riverside Dictionary* 233 (1984). And the *Oxford English Dictionary* lists 56 separate entries for the word "carry." II *The Oxford English Dictionary* 919-22 (2d ed. 1989). In view of the wide variety of dictionary definitions of the word "carry," it is obvious that the dictionary by itself cannot answer the question of what it means to "carr[y] a firearm."

To answer this question based on the plain language of the statute, then, it is also necessary to consider the *context* in which the word appears. Courts must "consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. '[T]he meaning of statutory language, plain or not, depends on context.'" *Bailey v. United States*, 516 U.S. at 145, quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (additional internal quotation omitted). The meaning of individual words such as "carries" in section 924(c)(1) thus cannot be "viewed in isolation," but rather must be interpreted "in light of the terms that surround it." *Smith v. United States*, 508 U.S. at 229. *See also King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991).

The context of section 924(c)(1) makes clear that the appropriate definition of "carries" is "bears on one's person." According to one *Webster's* dictionary, when the object "carried" is a firearm, the natural understanding of "carry" is "[t]o have or keep on one's person (*carry* a gun)." *Webster's II New Riverside University Dictionary*

at 232-33. So, too, other widely used dictionaries utilize this same contextual understanding of "carry." *Black's Law Dictionary* defines the *phrase* to "carry arms or weapons" as "[t]o wear, bear, or carry them *upon the person or in the clothing or in a pocket*, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person." *Black's Law Dictionary* 194 (5th ed. 1979) (emphasis added).[2] The dictionary relied upon by the government in opposing certiorari likewise defines "carry arms" as "[t]o bear weapons." *Webster's New International Dictionary of the English Language* at 412. And the *Oxford English Dictionary* notes that, when the object of the transitive verb "carry" is a weapon, as in "to carry arms," "carry" means "[t]o bear, wear, hold up, or sustain, as one moves about; habitually to bear about with one (*e.g.* any ornament, ensign, personal adjunct; also a name or other distinction)." II *The Oxford English Dictionary* at 921. The context of section 924(c)(1) thus establishes that a firearm must be borne on the defendant in order to be "carried."[3]

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[2] Even when *Black's* defines the word "carry" as a single word in isolation, it still makes clear that, in contexts where the object of the verb "carry" is a weapon, "carry" means "[t]o have or bear upon or about one's person, as a watch or weapon." *Black's Law Dictionary* at 194. *Accord Webster's Third New International Dictionary* at 343 ("to hold, wear, or have upon one's person (he *carries* a watch)").

[3] In an episode of the television series "M*A*S*H," the noted punster (and equally noted pacifist) Dr. "Hawkeye" Pierce illustrated that "carry" has a wide variety of definitions, which depend heavily on the context in which the word is used. When Captain Pierce's superior and nemesis, Major Frank Burns, ordered him to carry a sidearm in a holster, Captain Pierce responded:

> "I will not carry a gun, Frank. When I got thrown into this war I had a clear understanding with the Pentagon: no guns. I'll carry your books, I'll carry a torch, I'll carry a tune, I'll carry on, carry over, carry forward, Cary Grant, cash and carry, carry me back to Old Virginia, I'll even 'hari-kari' if you show me how, but I will not carry a gun!"

*See* <www.geocities.com/Hollywood/8915/mashquotes.html>; *hear also* this monologue at <www.elpaso.net/~jwprice2/carry.wav> (both visited on Jan. 21, 1998). Captain Pierce was, of course, refusing to bear a gun on his person.



This Court, in both *Bailey v. United States* and *Smith v. United States*, understood "carries a firearm" in a fashion consistent with the interpretation proposed by petitioner. The Court's unanimous opinion in *Bailey* offered the following examples of what constitutes "using" a gun without "carrying" it, and vice-versa:

> Under the interpretation we enunciate today, a firearm can be used without being carried, e.g., when an offender has a gun on display during a transaction, or barters with a firearm *without handling it*; and a firearm can be carried without being used, e.g., *when an offender keeps a gun hidden in his clothing throughout a drug transaction*.

*Bailey v. United States*, 516 U.S. at 146 (emphasis added). At least for purposes of this example, the Court was plainly seizing upon the ordinary and natural meaning of "carrying a firearm" — "handling" it. At the very least, this use of the term is entirely consistent with petitioner's proposed construction. Likewise, this Court's explicit example of what *would* constitute "carrying" — keeping a gun "hidden in [one's] clothing" — is also consistent with petitioner's construction: "borne on the person."

Similarly, both the majority and dissenting opinions in *Smith v. United States* ascribed a similar understanding to "carries a firearm." The majority stated the view that a defendant "would . . . 'carry' the firearm *by keeping it on his person* whether he intends to exchange it for cocaine or fire it in self-defense." 508 U.S. at 236 (emphasis added). So, too, in dissent, Justices Stevens and Souter joined Justice Scalia's proposal that, "in the context 'uses or carries a firearm,'" the word "carries" "means carrying it in such manner as to be ready for use as a weapon." 508 U.S. at 245-46 (Scalia, J., dissenting). This understanding, too, comports with the "bears on the person" definition. Similarly consistent with petitioner's construction is then-Chief Judge Breyer's view of the proper definition of carry: "the ordinary meanings of the words 'use' and '*carry*' . . . connote activity

*beyond simple possession*." *United States v. McFadden*, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting) (emphasis added).

Principles of linguistics, too, support this understanding. To say "W carries a gun," unmodified further by an informational phrase, is to say that W bears a gun on his person. The *en banc* Ninth Circuit recognized this "default understanding" of the phrase "carries a firearm" in its recent decision in *United States v. Foster*, No. 89-10405, 1998 WL 2521 (9th Cir. Jan. 5, 1998) (*en banc*). Judge Kozinski, writing for an 8-3 majority of the *en banc* court, explained this natural understanding:

> If I were to say "Don Corleone is carrying a gun" — or even just "Don Corleone is carrying" — you would understand that the Don has a sidearm *somewhere on his person*. A synonym for carry in this sense is to "pack heat." Criminals who pack heat are obviously much more dangerous than those who do not.

*Id.* at *1 (emphasis added). The unmodified, default interpretation of "carries a firearm," which is "has a sidearm somewhere on his person," is clearly the correct way to understand that term as it is used in section 924(c)(1).

Congress would have had to have used additional words, or different words, to ascribe a different meaning to the statute. For example, Congress might have sought to convey a different, broader understanding of "carries a firearm" by adding an informational phrase, such as a prepositional phrase — *e.g.*, "W carries a firearm *in his car*." Indeed, this Court recognized this linguistic principle in *Bailey*, when it noted that one might say "I *use* a gun to protect my house, but I've never had to *use* it." 516 U.S. at 143. This Court held that the latter, unmodified understanding of "use [a gun]" ("active employment") comported best with section 924(c)(1), which similarly contains the term "uses . . . a firearm" without further modification. But to convey an understanding of the term "use a gun" different than this default interpretation, the Court had to add the informational phrase "to protect my house." This signalled the reader to a different and broader understanding of "use" (*i.e.*, "possess for purpose of protection," rather than "actively employ"). Since "uses . . . a firearm" appears in section 924(c)(1) *without* such



an informational phrase, this Court held that the proper understanding of the term was the default interpretation — "active employment." *See Bailey v. United States*, 516 U.S. at 149.

Alternatively, Congress might have sought to convey a different meaning in section 924(c)(1) by choosing a different verb. Instead of using the verb "carries" with the object "firearm," Congress might have chosen a different verb, such as "possesses" or "transports." But Congress did not choose to use either of those words to describe the conduct criminalized by section 924(c)(1).

This was a significant choice on Congress's part. Congress has often used the terms "possess" and "transport" to criminalize other gun-related conduct; if it had meant either "possess" or "transport" in section 924(c)(1), it easily could have said that. "Carry" cannot mean "possess" for the same reason that, as this Court explained in *Bailey*, "use" cannot mean "possess": "Had Congress intended possession alone to trigger liability under § 924(c)(1) it easily could have so provided. This obvious conclusion is supported by the frequent use of the term 'possess' in the gun-crime statutes to describe gun-related conduct. See, *e.g.*, §§ 922(g), 922(j), 922(k), 922(*o*)(1), 930(a), 930(b)." *Bailey v. United States*, 516 U.S. at 143. *See also United States v. Foster*, 1998 WL 2521, at *3 ("The broad definition [advocated by the government] encompasses something close to the mere possession the Supreme Court in *Bailey* said was not within the scope of section 924(c)(1)."); *United States v. McFadden*, 13 F.3d at 467 (Breyer, C.J., dissenting) ("the ordinary meanings of the words 'use' and 'carry' . . . connote activity beyond simple possession").[4]

So, too, "carry" cannot mean "transport." Congress has used variations of "transport" many times in the firearms statutes,

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[4] Indeed, on several occasions since 1989, members of Congress have attempted, without success, to amend the text of section 924(c) in order to criminalize "possession" as well as the using and carrying of a firearm. *See* Cunningham & Fillmore, *Using Common Sense: A Linguistic Perspective on Judicial Interpretations of "Use a Firearm,"* 73 Wash. U.L.Q. 1159, 1198-1203 (1995); *see also* n. 5, *infra*.

including in section 924 itself. *See, e.g.*, 18 U.S.C. §§ 922(a)(1)(A), 922(a)(1)(B), 922(a)(2), 922(a)(3), 922(a)(4), 922(a)(5), 922(e), 922(f)(1), 922(g), 922(h), 922(i), 922(j), 922(k), 922(n), 924(b), 925(a)(1), 925(a)(2), 925(a)(4) (1994). "If Congress meant 'transport' in section 924(c), it knew how to say so." *United States v. Foster*, 1998 WL 2521, at *3. *See also United States v. Cardenas*, 864 F.2d 1528, 1534-35 (10th Cir.) ("Congress knows how to use 'transports' when it chooses; in § 924(c) it did not so choose"), *cert. denied*, 491 U.S. 909 (1989); *United States v. Bailey*, 36 F.3d 106, 125 (D.C. Cir. 1994) (*en banc*) (Williams, J., dissenting) (same), *rev'd*, 516 U.S. 137 (1995); Note, *Excuse Me, Are You "Using" That Gun? The United States Supreme Court Examines 18 U.S.C. § 924(c)(1) in* Bailey v. United States, 30 Creighton L. Rev. 513, 563 (1997) ("Congress did not intend to impose a section 924(c) violation upon an individual . . . who merely 'transported' a firearm while committing a drug trafficking crime."); *see generally Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quotation omitted). If Congress wishes to criminalize either possession or transportation of a firearm, or both, during and in relation to a drug-trafficking crime, it is free to do so in the future. But, to date, it has not done so.[5]

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[5] Congress is presently considering legislation that would amend section 924(c)(1) in light of this Court's *Bailey* decision. The Senate has passed a bill amending the relevant language of section 924(c)(1) so that it would read: "[Whoever], during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, *or who, in furtherance of any such crime, possesses a firearm*, . . . shall . . . be sentenced to imprisonment . . . ." S. 191, at 2-3, 105th Cong., 1st Sess. (passed Nov. 13, 1997).

Likewise, presently pending before the House of Representatives is a bill, H.R. 424, 105th Cong., 1st Sess. (1997), that was adopted by the House Committee on the Judiciary on September 9, 1997. H.R. 424 would abolish the present "uses or carries" structure of section 924(c)(1) in favor of a "graded penalty structure" that would impose a 10-year prison sentence for "possess[ing] a firearm in furtherance of the crime," a 15-year sentence for "brandish[ing] a firearm" during and in relation to the crime, and a 20-year sentence for "discharg[ing] a firearm" during and in relation to the crime. *See* H.R. Rep. No. 105-344, at 2, 3 (1997). The House Judiciary Committee also noted that "[t]he word 'possession' has a broader meaning than either 'uses' or 'carries.'" *Id.* at 6.



Construing "carries a firearm" to mean "bears on one's person" is also consistent with Congress's decision to criminalize together, in section 924(c)(1), both the "use" and the "carrying" of a firearm. Two Terms ago, this Court in *Bailey* established that "use" of a firearm under section 924(c)(1) requires a narrow definition — "active employment" of the weapon — not a broad definition, such as merely placing the gun "at the ready," as the government had argued. 516 U.S. at 150. Thus, in order to preserve the parallel structure of the statute, the term "carries" in section 924(c)(1) should also be construed narrowly, limited to its ordinary and natural meaning of "bears on the person." "Construing the two terms *in pari materia*, [there is] no basis for defining 'carry' broadly while 'use' is defined narrowly." *United States v. Foster*, 1998 WL 2521, at *3.

Petitioner's proposed construction of section 924(c)(1) also makes perfect sense when its severe mandatory minimum sentences are compared to the lesser, more flexible sentences generally permitted under other firearms statutes. *See generally* Cunningham & Fillmore, *Using Common Sense: A Linguistic Perspective on Judicial Interpretations of "Use a Firearm,"* 73 Wash. U.L.Q. 1159, 1188 (1995). Section 924(c)(1) imposes a grave, mandatory minimum sentence of five years for "carrying" a firearm during and in relation to a crime of drug trafficking, and provides that the minimum sentence will escalate to ten, twenty, or thirty years, or "life imprisonment without release," depending on the type of firearm carried and whether the offense is a second or subsequent offense. 18 U.S.C. § 924(c)(1). Additionally, a sentence imposed under section 924(c)(1) may not "run concurrently with any other term of imprisonment." *Id.*

By contrast, and for example, section 924(b) forbids, *inter alia*, "ship[ping], transport[ing], or receiv[ing] a firearm or any

ammunition in interstate or foreign commerce" with the intent to commit another offense punishable by more than one year of prison. Section 924(b), which criminalizes "ship[ping]" and "transport[ing]," but not "carrying" a firearm, contains no mandatory minimum sentence (it does impose a *maximum* sentence of ten years imprisonment, however), and may run concurrently with other sentences. 18 U.S.C. § 924(b). Indeed, a violation of section 924(b) could conceivably be punished by a "fin[e] under this title" alone. *Id.* By prescribing a more onerous sentencing scheme for "carr[ying]" a firearm than for "ship[ping]" or "transport[ing]" one, Congress has obviously viewed "carrying" a firearm to be a far more egregious, and therefore limited offense. *Cf. United States v. McFadden*, 13 F.3d at 467 (Breyer, C.J., dissenting). That conclusion comports with common sense: "A drug dealer who packs heat is more likely to hurt someone or provoke someone else to violence" than a drug dealer who merely possesses or transports a weapon without bearing it on his person. *See United States v. Foster*, 1998 WL 2521, at *4.

The different, and far more serious nature of "carrying" a firearm is also borne out by the sentence enhancement imposed by the United States Sentencing Guidelines for merely "possess[ing] a firearm." *See Bailey v. United States*, 516 U.S. at 150. For example, under U.S.S.G. § 2D1.1(b)(1) (1997), "[i]f a dangerous weapon (including a firearm) was possessed" by the defendant in connection with the crime, the court is to assign a two-level enhancement to the offense level.[6] This enhancement, according to the Sentencing Commission, "reflects the increased danger of violence when drug traffickers possess weapons." U.S.S.G. § 2D1.1 application note 3. Even so, the sentence enhancement for merely "possess[ing]" a weapon is far less severe than the five-year (or greater) mandatory minimum imposed by statute for "carrying" a firearm in violation of section 924(c)(1).

On the facts of this case, for example, because petitioner's drug convictions involved 3.6 kilograms of marijuana, his base offense

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[6] Section 2D1.1(b)(1) does not apply if the defendant is convicted under section 924(c). *See* U.S.S.G. § 2K2.4 application note 2 (1997).



level was 12. *See* U.S.S.G. § 2D1.1(a)(3) (1995). After adjusting for petitioner's acceptance of responsibility, *see* U.S.S.G. § 3E1.1(a) (1995), his final offense level was 10 — placing him in the 6-to-12 month sentencing range. *See* U.S.S.G. ch. 5, pt. A (1995). The two-level enhancement for possessing a firearm would have increased the final offense level to 12 (a sentencing range of 10 to 16 months). In this case, then, petitioner's mere "possession" of a firearm would have resulted in only four months' additional prison time — a far cry from the five-year statutory minimum for a defendant who "carries a firearm" in contravention of section 924(c)(1). *See United States v. McFadden*, 13 F.3d at 467 (Breyer, C.J., dissenting).

Finally, petitioner's proposed construction does not suffer from any of the "impossible line-drawing problem[s]" that the government's and the Fifth Circuit's constructions would engender. *See Bailey v. United States*, 516 U.S. at 149. Under petitioner's proposed construction, the term "carries a firearm" would simply mean that the firearm was borne on the defendant's person. This would be an easily explained, easily applied standard for the lower courts: Juries so charged would understand precisely the sort of evidence required to find that the defendant had "carried a firearm." Likewise, both district courts and courts of appeals would have an easily applied standard for ruling on challenges to the sufficiency of the evidence.

2. Even though the legislative history of section 924(c) is "sparse," *Simpson v. United States*, 435 U.S. 6, 15 (1978), what there is points in the direction of a congressional view that "carries" means "bears on the person."

Section 924(c) was originally enacted as part of the Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1224, and provided in pertinent part:

> Whoever — (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States, shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years.

This provision originated in the House as a floor amendment to the Gun Control Act proposed by Representative Poff. 114 Cong. Rec. 22,231 (1968). *See Simpson v. United States*, 435 U.S. at 13-14 (discussing origins of section 924(c)). The Poff amendment, which ultimately provided the language for section 924(c), was adopted by the House instead of an alternative, similar amendment (also containing the "use or carries" language) proposed by Representative Casey. *See* 114 Cong. Rec. at 21,765-66, 21,770, 22,229.

The legislative history suggests that "carries a firearm" was understood by the representatives to mean "bears on one's person." Several representatives raised concerns that policemen (or other persons legally authorized to carry guns) would be subject to punishment even if the crime had nothing to do with the gun: "Suppose a policeman carrying a gun, as policemen do, were to slap somebody and it were found that he was not justified in doing so." 114 Cong. Rec. at 21,788 (statement of Rep. Yates). *See also id.* at 21,788-89 ("If I am convicted of assault — if I push somebody in the street or punch somebody in the nose — with no use of the pistol, but merely carrying the pistol as I am licensed to do . . . .") (statement of Rep. Scheuer). In these statements, the representatives were clearly using the word "carrying" to mean "bearing on the person," for the only way that a person "in the street" could carry a firearm, while at the same time slapping, punching, or otherwise physically assaulting a person, would be by bearing the firearm on his person.

Other representatives also made statements evidencing an understanding that "carries" means "bears on one's person." In objecting to the proposed requirement that the firearm be carried "unlawfully," Representative (now Judge) Meskill stated: "I think the provisions of the Poff substitute should apply to every person whether he carries a gun lawfully or unlawfully, if he commits a Federal felony while *he has a firearm on his person*." 114 Cong. Rec. 22,236 (emphasis added). Representative Pucinski, speaking in support of the Casey bill, likewise recognized that the proposed bill would, "for the first time, make a criminal who *takes a gun in his hand* realize that he is going to be prosecuted to the fullest extent of the Federal law." *Id.* at 22,239 (emphasis added). These exchanges



suggest that individual members of Congress contemplated that "carries" was synonymous with "bears on one's person."

The amendment history of section 924(c) also suggests this construction. *See Bailey v. United States*, 516 U.S. at 147. Congress substantially amended section 924(c) as part of the Comprehensive Crime Control Act of 1984. *See* Pub. L. No. 98-473, § 1005(a), 98 Stat. 1837, 2138-2139. Among other changes, the law removed the "unlawfully" requirement from "carries," and merged the "uses" and "carries" prongs into a single subsection. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 312 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3491-92. The Senate Report suggested that "[e]vidence that the defendant had a gun in his pocket but did not display it, or refer to it," would support a conviction for "carrying" a firearm. 1984 U.S.C.C.A.N. at 3492 n.10.[7] This passage is instructive, for it shows that "each enumerated example of conduct that would violate the 'carry' prong [of section 924(c)(1)] involves a situation where the perpetrator was 'carrying' the weapon on his or her person, and thus, had the firearm available for immediate use." Note, 30 Creighton L. Rev. at 562.

3. Finally, even if this Court were to conclude that the text, context, and history of section 924(c)(1) do not compel petitioner's proposed interpretation of "carries a firearm," there can be no serious doubt that petitioner's interpretation is *at least* a reasonable one, and that the statute is therefore *at least* ambiguous. Under the rule of

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[7] The pertinent part of the Senate Report reads as follows:

> Evidence that the defendant *had a gun in his pocke:* but did not display it, or refer to it, could nevertheless support a conviction for "carrying" a firearm in relation to the crime if from the circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape. . . . Moreover, the requirement that the firearm's use or possession be "in relation to" the crime would preclude its application in a situation where its presence played no part in the crime, *such as a gun carried in a pocket* and never displayed or referred to in the course of a pugilistic barroom fight.

1984 U.S.C.C.A.N. at 3492 n.10 (emphasis added).

lenity, which is an "established rule of construction," "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Simpson v. United States*, 435 U.S. at 14, quoting *United States v. Bass*, 404 U.S. 336, 347 (1971). *See also United States v. Lanier*, 117 S. Ct. 1219, 1225 (1997); *United States v. Granderson*, 511 U.S. 39, 54 (1994); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284-85 (1978); *Rewis v. United States*, 401 U.S. 808, 812 (1971); *Bell v. United States*, 349 U.S. 81, 83 (1955). That rule is dispositive here.

The rule of lenity is a "wise principl[e]" of strict construction of criminal statutes, founded on the well-settled rationale that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *United States v. Bass*, 404 U.S. at 348, quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.). As demonstrated above, "the common world" — or at least reasonable members thereof — would understand a prohibition upon "carry[ing] a firearm" to cover those persons who bear firearms upon their person, but no others. Thus, neither the Fifth Circuit's, nor the government's, interpretation of section 924(c)(1) can be said to be "unambiguously correct," *United States v. Granderson*, 511 U.S. at 54, which compels adoption of petitioner's proposed interpretation.

4. If the Court agrees with petitioner that the proper construction of "carries a firearm" is "bears on the person," the proper course would be for this Court to reverse the judgment of conviction. There is no dispute that the firearm was "'[l]ocated inside the glove compartment of [petitioner's] Ford truck'" (Pet. App. 2a, 9a, 12a-13a; J.A. 12), where it had been "for a long period of time." Pet. App. 10a.

## II. AT THE VERY LEAST, A FIREARM MUST BE IMMEDIATELY ACCESSIBLE TO THE DEFENDANT TO BE "CARRIE[D]" FOR PURPOSES OF SECTION 924(c)(1)

If this Court should decline to adopt the construction of "carries a firearm" petitioner has proposed in section I, above, it should still reject the Fifth Circuit's and the government's broad constructions of



"carries a firearm" and hold that a firearm must be, if not actually on the defendant, immediately accessible within a vehicle for use as a weapon to be "carried."

1. Defining the term "carries a firearm" to mean "possesses in a vehicle in a manner immediately accessible to the defendant" is supported by decisions of the courts of appeals for the Second, Sixth, and Ninth Circuits. *See, e.g., United States v. Cruz-Rojas*, 101 F.3d 283, 286 (2d Cir. 1996); *United States v. Malcuit*, 104 F.3d 880, 885 (6th Cir.), *reh'g en banc granted*, 116 F.3d 163 (6th Cir. 1997); *United States v. Foster*, 1998 WL 2521, at *5. Although this construction would be less faithful to the statutory language and context than the "bears on one's person" construction that petitioner principally advocates above, it is far more supportable than the unreasonably broad views taken by the Fifth Circuit and by the government.

The most extensive explication of the "immediate access" construction of section 924(c)(1) came in the Ninth Circuit's recent *en banc* decision in *United States v. Foster*. There, the Ninth Circuit recognized the correctness of the principal construction advocated by petitioner — the "bears on the person" construction of "carries a firearm." See 1998 WL 2521 at * 1 ("If I were to say 'Don Corleone is carrying a gun' . . . you would understand that the Don has a sidearm *somewhere on his person*.") (emphasis added). However, the court went on to say that "[t]he key aspect of th[is] definition is not that the weapon actually be borne on the person. Rather, it is that the weapon remain within easy reach while the individual is in motion. . . . The essence is that the weapon moves with the person and can be swiftly put to use." *Id.* at * 2.

Like the Ninth Circuit, the Second and Sixth Circuits have also adopted this intermediate construction of "carries a firearm." *See, e.g., United States v. Cruz-Rojas*, 101 F.3d at 286; *United States v. Giraldo*, 80 F.3d 667, 677-78 (2d Cir.), *cert. denied*, 117 S. Ct. 135 (1996); *United States v. Malcuit*, 104 F.3d at 885, *United States v. Riascos-Suarez*, 73 F.3d 616, 623 (6th Cir. 1996); *see also* Pet. App. 14a-15a (collecting cases). And this position is also consistent with the stated views of Justices Scalia, Stevens, and Souter, that "carrying

a firearm" means "carrying it in such manner as to be ready for use as a weapon." *Smith v. United States*, 508 U.S. at 245-46 (Scalia, J., dissenting).

At an absolute minimum, this intermediate construction of "carries a firearm" must be adopted. No broader reading of the statute would be consistent with *Bailey*, with ordinary tools of statutory construction, or with the legislative history of section 924(c)(1).

2. Construing "carries a firearm" to mean "possesses the firearm in an area of a vehicle immediately accessible to the defendant" would also be consistent with the rule of lenity, as discussed above. This intermediate construction is also a "reasonable" one, evidenced by the fact that virtually every active judge of the Second Circuit,[8] the judges of the Sixth Circuit (pending the *en banc* decision in *United States v. Malcuit*), and an 8-3 *en banc* majority of the Ninth Circuit has now subscribed to it.

3. In the event that this Court adopts the "immediate access" construction of "carries a firearm," the proper course would be for this Court to reverse the judgment of conviction. The government has never disputed that the pistol possessed by petitioner was contained in a *locked* glove compartment, as stated in the pre-sentence report prepared by the United States Probation Office and cited by the district court and the Fifth Circuit (*see* Pet. App. 3a, 13a). There can be no doubt that a firearm possessed in a locked glove compartment would not be immediately accessible. Thus, even under this alternative proposed construction of "carries a firearm," petitioner's conviction should be reversed.

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[8] Six of the nine active judges (and four senior judges) of the Second Circuit have agreed with this construction; none has disagreed with it. *See* Reply Brief for the Petitioner (July 7, 1997), at 4 n.4 (citing cases); *see also United States v. Riascos-Suarez*, 73 F.3d at 623 (per Oakes, J.).



## III. NEITHER THE CONSTRUCTION ADOPTED BY THE FIFTH CIRCUIT, NOR THE ONE ADVOCATED BY THE GOVERNMENT, CAN BE SQUARED WITH THE TEXT, CONTEXT, OR HISTORY OF THE STATUTE

The Fifth Circuit held that "[w]hen . . . the defendant knowingly possesses a firearm in a motor vehicle and uses the vehicle during the commission of the underlying crime, then *as a matter of law* the firearm is carried during a drug-trafficking offense for purposes of § 924(c)." Pet. App. 6a (emphasis added). The government, in opposing certiorari, offered a slightly different formulation: "[T]o carry an object means to transport it." Opp. 6. Neither of these constructions can be squared with the text or context of section 924(c)(1).

1. As discussed at pp. 8-22, above, the ordinary and natural understanding of "carries a firearm," which is supported by the text and context of section 924(c)(1), means "bears on the person," or, at the very least, "bears in a vehicle in a manner immediately accessible to the defendant." Even though one of the many dictionary definitions of the word "carry" is "to move while supporting (as in a vehicle or in one's hands or arms)" (*Webster's Third New International Dictionary* at 343; *see* Opp. 6), this is not the ordinary or natural meaning of "carry" as used in the statutory phrase at issue, "carries a firearm."

2. "Carry," in the context of section 924(c)(1), cannot mean either "knowingly possess" in a vehicle, as the Fifth Circuit held, or "transport," as the government urges. Either construction would violate the well-established principle that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. at 23 (quotation omitted). As noted at pp. 13-14, above, Congress knows how to criminalize both "possession" and "transportation" of a firearm, and it has done so in a wide variety of contexts. And Congress would be free to amend section 924(c)(1) in the future in order to criminalize "possession"

and/or "transportation." But it did not do so in current section 924(c)(1).

3. Additionally, the approaches of the government and of the Fifth Circuit "would distort the language of the statute," *Bailey v. United States*, 516 U.S. at 149, by creating an unsupportable, unwieldy and ultimately unworkable distinction between "vehicle cases" and non-vehicle cases. Indeed, the Fifth Circuit has freely admitted that it has carved out a specialized meaning for "carry" in "vehicle cases": "When a vehicle is used, 'carrying' takes on a *different meaning* from carrying on the person because the means of carrying is the vehicle itself." *United States v. Pineda-Ortuna*, 952 F.2d 98, 104 (5th Cir.), *cert. denied*, 504 U.S. 928 (1992) (emphasis added). The First, Fourth, Eighth and Tenth Circuits also subscribe to the notion that the word "carries" takes on a different meaning when the defendant is in a vehicle. *See, e.g., United States v. Nelson*, 109 F.3d 1323, 1326 (8th Cir. 1997) (holding that "when a motor vehicle is used, 'carrying a weapon' takes on a less restrictive meaning than carrying on the person") (citation and quotation omitted); *United States v. Cleveland*, 106 F.3d 1056, 1066 (1st Cir.), *cert. granted*, 118 S. Ct. 621 (1997); *United States v. Mitchell*, 104 F.3d 649, 653-54 (4th Cir. 1997); *United States v. Cardenas*, 864 F.2d at 1535-36.

This approach is manifestly erroneous. Nothing in the text or context of the statute, or in its legislative history, suggests that the term "carries" should bear a "different meaning" simply because of the surroundings of the defendant at the time of his arrest. Of course, the text of section 924(c)(1) uses the term "carries a firearm" once and only once. While in the most extraordinary cases, it may be appropriate to conclude that the same term used *twice* in the same statute bears a different meaning each time, *see Dewsnup v. Timm*, 502 U.S. 410, 417-20 (1992), no coherent principle of statutory construction would allow the same term used *once* in the same statute to bear contrary meanings in different cases. Indeed, "[i]t would be an extraordinary principle of construction that would authorize or permit a court to give the same statute wholly different meanings in different cases." *United States v. Louisiana*, 394 U.S. 11, 34 (1969).



"[I]mpossible line-drawing problem[s]" (*Bailey v. United States*, 516 U.S. at 149) would also be presented by the government's and Fifth Circuit's constructions. "[T]hose same line-drawing problems [presented by the government's rejected construction of 'use' in *Bailey*] would accompany any effort to expand the 'carry prong' to situations where the firearm was not immediately accessible. For example, a situation could arise where the weapon was in the back of a van, a camper, inside a car being towed, or possibly even in the trunk of a friend's car who is following the defendant to a drug deal." Note, 30 Creighton L. Rev. at 563 (footnote omitted). And absent such line-drawing, absurd results would follow: Under the government's construction of the statute, a gun placed in the caboose of a train would be transported and thus "carried" by the engineer, even where the engineer was 50, 100, or more railroad cars removed from the gun. It is difficult to believe that Congress would have intended to punish that engineer as severely as one who "uses" or "actively employs" a firearm, *e.g.*, by threatening or shooting at someone with it.

4. If, even in light of these showings, this Court concludes that either the Fifth Circuit's or the government's construction is a reasonable construction of section 924(c)(1), the Court should still adopt one of petitioner's proposed constructions under the rule of lenity. That rule, of course, applies "where text, structure, and history" of a criminal statute "fail to establish that the Government's position is unambiguously correct." *United States v. Granderson*, 511 U.S. at 54 (emphasis added). Even if the constructions adopted by the Fifth Circuit, or advocated by the government, could be said to be "reasonable" — and petitioner does not believe that either one can — they cannot possibly be said to be "unambiguously correct."

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1997

FRANK J. MUSCARELLO, PETITIONER

*v.*

UNITED STATES OF AMERICA

DONALD E. CLEVELAND AND
ENRIQUE GRAY-SANTANA, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT AND THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT*

## BRIEF FOR THE UNITED STATES

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## QUESTION PRESENTED

Whether a defendant "carries" a firearm within the meaning of 18 U.S.C. 924(c) if the defendant has it with him in a locked glove compartment or the trunk of a vehicle in order to facilitate a drug transaction.

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# In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 96-1654

FRANK J. MUSCARELLO, PETITIONER

*v.*

UNITED STATES OF AMERICA

No. 96-8837

DONALD E. CLEVELAND AND
ENRIQUE GRAY-SANTANA, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON WRITS OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FIFTH CIRCUIT AND THE*
*UNITED STATES COURT OF APPEALS*
*FOR THE FIRST CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the court of appeals in No. 96-1654 (96-1654 Pet. App. 1a-7a) is reported at 106 F.3d 636. The opinions of the district court (96-1654 Pet. App. 8a-11a, 12a-13a) are unreported. The opinion of the court of appeals in No. 96-8837 (96-8837 J.A. 86-114) is reported at 106 F 3d 1056. The opinions of the district court (96-8837 J.A. 45-57, 58-71) are unreported.

### JURISDICTION

The judgment of the court of appeals in No. 96-1654 was entered on February 13, 1997. The petition for a

writ of certiorari was filed on April 18, 1997, and was granted on December 12, 1997. The judgment of the court of appeals in No. 96-8837 was entered on February 18, 1997. The petition for a writ of certiorari was filed on April 30, 1997, and was granted on December 12, 1997. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

**STATUTORY PROVISION INVOLVED**

18 U.S.C. 924(c)(1) is reproduced in pertinent part in an appendix to this brief.

**STATEMENT**

On May 25, 1995, petitioner Muscarello entered a plea of guilty in the United States District Court for the Eastern District of Louisiana to one count of conspiracy to distribute marijuana, in violation of 21 U.S.C. 846, one count of distributing marijuana, in violation of 21 U.S.C. 841(a)(1), and one count of using or carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). Before petitioner was sentenced, he moved to quash or dismiss the Section 924(c) count of the indictment, in light of this Court's decision in *Bailey* v. *United States*, 516 U.S. 137 (1995). The district court granted the motion (96-1654 Pet. App. 8a-11a), and the court of appeals reversed. *Id.* at 1a-7a.

Following the entry of guilty pleas in the United States District Court for the District of Massachusetts, petitioners Cleveland and Gray-Santana were each convicted on one count of attempting to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846, and one count of using or carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c). Petitioners were each sentenced to a total of 180 months' imprisonment, to be followed by five years' supervised release. The court of appeals affirmed. 96-8837 J.A. 86-114.



1. a. On May 25, 1995, petitioner Muscarello entered a plea of guilty to, *inter alia*, using or carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). 96-1654 J.S. 6-10. At the plea hearing, the government submitted a factual statement signed by Muscarello's attorney. *Id.* at 11-13. The statement established that, following negotiations with a cooperating individual (CI) and an undercover agent of the Drug Enforcement Administration (DEA), Muscarello arranged for the delivery of a total of eight pounds of marijuana in two separate transactions. Both the negotiations and the payment for the marijuana took place in Muscarello's Ford pick-up truck. In the first transaction, Muscarello led the CI and the DEA agent to a location where marijuana had been left in a plastic bag at the side of the road. In a second transaction on the same day, Muscarello again led the CI and the DEA agent to a certain location, and upon arrival, Muscarello removed plastic bags containing marijuana from his vehicle. Following Muscarello's arrest, a loaded firearm was found in the locked glove compartment of his truck. *Id.* at 12; 96-1654 Pet. App. 8a. The signed factual statement asserted that this firearm was "knowing[ly] possessed in [petitioner's] vehicle and carried for protection in relation [to] the above described drug trafficking offense." 96-1654 J.A. 12. At the plea hearing, Muscarello attested under oath to the accuracy of the written factual statement. *Id.* at 24.

b. On March 7, 1996, before Muscarello was sentenced, he filed a motion in the district court pursuant to Federal Rule of Criminal Procedure 12(b)(2) to

quash or dismiss the Section 924(c) count of the indictment. Muscarello argued that the charge was legally defective in light of this Court's decision in *Bailey*. 96-1654 Pet. App. 2a. The government opposed the motion on the ground that the factual statement established that petitioner had "carried" the firearm within the meaning of Section 924(c). Following a hearing, the district court granted the motion to dismiss. *Id.* at 8a-11a.

The court acknowledged that Muscarello admitted in the factual statement that he knowingly possessed and carried the firearm in his vehicle for protection in relation to his drug trafficking offenses. 96-1654 Pet. App. 9a-10a. The court relied instead, however, on the following statement from the presentence investigation report:

> As to the weapon, [petitioner] does not deny his possession of the pistol. The pistol was in the glove compartment of his truck where it had been for a long period of time. He denies any conscious decision to carry the gun in relation to the marijuana sale, and stated that he carried it in relation to his job with the Tangipahoa Parish Sheriff's Office as a balif [sic] at the Courthouse in Amite.

*Id.* at 10a. The court accordingly concluded that:

> [petitioner] did not knowingly possess the firearm *in relation* to a drug-trafficking crime. To the contrary, [petitioner], his employment background considered, knowingly possessed the firearm in the glove compartment of his vehicle in furtherance of his job requirements and not for active employment in the charged transaction.



*Ibid.* The district court therefore granted Muscarello's motion to dismiss the Section 924(c) count, although it did not rely on *Bailey* in doing so. 96-1654 Pet. App. 10a-11a.

The district court denied the government's motion for reconsideration. 96-1654 Pet. App. 12a-13a. The court again acknowledged that Muscarello had admitted carrying the gun for protection in relation to his drug trafficking, but the court noted that "this is a pre[-]*Bailey* composition by the government and a pre[-]*Bailey* consideration by [petitioner] and his counsel." *Id.* at 12a. Again citing the above-quoted language from the presentence report, the district court reaffirmed its conclusion that Muscarello "did *carry* a firearm in the [locked] glove compartment of his vehicle, but not *in relation* to the commission of a drug trafficking crime." *Id.* at 13a.

c. The court of appeals reversed in a per curiam decision. 96-1654 Pet. App. 1a-7a. The court first noted that, because *Bailey* did not address the "carrying" prong of Section 924(c), its prior "carrying" jurisprudence remained valid. *Id.* at 4a. Under the court's pre-*Bailey* decision in *United States* v. *Pineda-Ortuno*, 952 F.2d 98, 104 (5th Cir.), cert. denied, 504 U.S. 928 (1992), "the 'carrying' requirement of § 924(c) is met if the operator of the vehicle knowingly possesses the firearm in the vehicle during and in relation to a drug trafficking crime." 96-1654 Pet. App. 4a-5a.

The court held that the district court had erred in two respects in finding that the "in relation to" element of the offense was not satisfied: first, by discrediting as a "pre-*Bailey* composition" the factual statement in which Muscarello had concurred, and second, by relying on Muscarello's "post-conviction,

self-serving declaration to the probation officer * * * regarding his subjective intent in possessing the pistol in the truck." 96-1654 Pet. App. 5a. Those errors, the court concluded, required reversal of the district court's decision. *Id.* at 6a-7a.

The court also reaffirmed *Pineda-Ortuno*'s holding that "[w]hen a vehicle is used, 'carrying' takes on a different meaning from carrying on a person because the means of carrying is the vehicle itself." 96-1654 Pet. App. 6a. Thus, the court reasoned, "the fact that [petitioner's] glove compartment was locked does not prevent conviction." *Ibid.*

2. a. Petitioners Cleveland and Gray-Santana were charged, along with Juan Rodriguez and Ramon Vasquez, in a five-count superseding indictment with various narcotics and weapons offenses. At petitioners' respective plea hearings, the government presented a summary of its evidence that established the following facts, in which petitioners concurred. 96-8837 J.A. 9-16, 21-27.

Before October 18, 1994, petitioner Gray-Santana agreed with Rodriguez to purchase between five and eight kilograms of cocaine. Rodriguez arranged to procure the cocaine and transport it to Boston. Petitioners Gray-Santana and Cleveland then formulated a plan to steal some of the cocaine from Rodriguez, rather than purchase it. Pursuant to their plan to steal the cocaine, petitioners obtained weapons. 96-8837 J.A. 46-47, 59. At his guilty plea hearing, Cleveland admitted that for the purpose of carrying out the theft, he and Gray-Santana "assembled three weapons, placed them in a Louis Vuitton bag, [and] put the bag in [a] car" on the day of the planned transaction. *Id.* at 13, 14-16. Gray-Santana admitted



that he had purchased one of the weapons earlier that day. *Id.* at 26, 27.

In the meantime, DEA agents were conducting surveillance of a known drug trafficker at an apartment complex in Connecticut. The agents observed four individuals, including Rodriguez and Vasquez, leaving the complex. Rodriguez drove a white Isuzu, and Vasquez and two others drove a Lexus. The DEA agents followed the four men to Boston, where they observed the driver of the Lexus talking with Gray-Santana, who was sitting in a white Mazda driven by Cleveland. All three vehicles were later observed parked close together on St. Stephens Street in Boston. At that time, Vasquez was sitting in the back of the Mazda, and Gray-Santana was in the Isuzu with Rodriguez. As the vehicles attempted to leave the area, the DEA agents stopped and searched both the Mazda and the Isuzu. Six kilograms of cocaine were found in a hidden compartment of the Isuzu, and three handguns were found in the trunk of the Mazda. 96-8837 J.A. 46-47, 59-60. Two of the three handguns were semiautomatic, and all were loaded with live ammunition. *Id.* at 12, 25.

b. Petitioners Cleveland and Gray-Santana entered guilty pleas, respectively, on July 17, 1995, and July 21, 1995. 96-8837 J.A. 60, 47. After this Court decided *Bailey*, each petitioner sought relief from his Section 924(c) conviction. On January 11, 1996, after he had filed a notice of appeal from his final judgment of conviction, Cleveland filed a Motion for Correction of Sentence or Other Appropriate Relief, pursuant to Federal Rule of Criminal Procedure 35(c) and 28 U.S.C. 2255. 96-8837 J.A. 58. On December 8, 1995, after he had been sentenced but before a final judgment of conviction was entered, Gray-Santana filed a

similar motion. *Id.* at 45. Gray-Santana also sought to withdraw his plea. *Ibid.*[1]

The district court held that, in light of *Bailey*, petitioners' Section 924(c) convictions could not be sustained under the "use" prong of the statute. 96-8837 J.A. 48-49, 62-63. The court found, however, that the dictionary definition of "carry" reached petitioners' conduct of transporting firearms in a vehicle. *Id.* at 50, 64-65. The court rejected petitioners' contentions that First Circuit authority required that the weapon be immediately accessible to the defendant in order to sustain a conviction for "carrying" it. *Id.* at 51-55, 66-70. Instead, the court found that the evidence in the case was "a prime example of using a vehicle to carry firearms in relation to a drug trafficking crime," and it denied petitioners' motions. *Id.* at 56,70.

c. The court of appeals affirmed. 96-8837 J.A. 86-114. At the outset, the court agreed that petitioners' convictions could not be sustained under the "use" prong of Section 924(c) after *Bailey*, as there was no evidence that the firearms had been actively employed. *Id.* at 104. The court held, however, that petitioners had "carried" the firearms within the meaning of Section 924(c).

[1] The district court noted that, because Cleveland filed his motion more than seven days after sentencing, he could not obtain relief under Rule 35(c). 96-8837 J.A. 61. The court stated, however, that Cleveland could proceed under Section 2255. *Ibid.* With respect to Gray-Santana, the district court "treat[ed] the pending motion as a motion to reconsider sentencing, and, in the alternative, to withdraw his plea," and the court "conclude[d] that it is appropriate to decide defendant Gray[-Santana]'s challenge to the sentence on the merits." *Id.* at 45.



The court of appeals reasoned that a firearm can be "carried" in a vehicle, as well as on a suspect's person. 96-8837 J.A. 105-106. The court also held, in agreement with several other circuits, that a firearm transported in a vehicle need not be immediately accessible to the defendant in order to be "carried" under Section 924(c). *Id.* at 106-107. After considering the ordinary meaning of "carry," the court found that the term "clearly includes the transport of a firearm by car; the concept of whether or not the carried item is within reach plays no part in the definition." *Id* at 108. The court recognized that in some circumstances, "a firearm's immediate accessibility to a defendant might be relevant to determining whether or not he was carrying it 'during and in relation to' a drug trafficking crime," but the court concluded that that statutory element was satisfied in this case. *Id.* at 110. Finally, the court analyzed decisions of the Second, Sixth, and Ninth Circuits—which had held that immediate accessibility is required under the "carry" prong—and concluded that the reasoning of those courts was "unpersuasive." *Id.* at 111-113.[2]

## SUMMARY OF ARGUMENT

Section 924(c)(1) punishes any person who "uses or carries" a firearm during and in relation to a drug trafficking offense. Section 924(c)'s prohibition on "carr[ying] a firearm" includes the act of carrying a firearm in a vehicle. That conclusion follows from the ordinary meaning of the term "carry," as confirmed

[2] The court of appeals rejected petitioners' Fourth Amendment challenge to the search of the vehicles, 96-8837 J.A. 99-1100, and Gray-Santana's claims that a statement he had made to a DEA agent was involuntary and taken despite his previous invocation of his right to counsel, *id.* at 100-103.

by the primary entries for the word in every authoritative dictionary. Although to "carry" firearms also includes carrying firearms on one's person, there is no basis for limiting the term in that way. Petitioners cite no court anywhere that has adopted their suggestion that the unqualified word "carry" in a firearms statute like Section 924(c) is restricted to carrying on the person. Nor is there any basis in any standard dictionary definition to limit the term "carry" to instances in which the item carried is immediately accessible to the person carrying it. Although accessibility may be of relevance in analyzing the "in relation to" element of Section 924(c), it has nothing to do with whether a firearm is "carried" for purposes of Section 924(c).

The legislative history of Section 924(c) confirms that, when Congress first adopted the statute with its "carry" prohibition, Congress intended no restriction on the means by which the firearm could be carried. The debates surrounding the enactment of Section 924(c)'s "carry" prohibition make the purpose of the statute clear: to give offenders who intend to commit Section 924(c)'s predicate offenses a powerful incentive to leave their guns at home. Under petitioner's approach, however, that incentive would disappear so long as the offender is careful to remove the firearm from his person and place it in his car. The evidence surrounding the enactment of Section 924(c) does not support such an incongruous construction. Nor did Congress intend to eliminate the incentive so long as the offender placed the firearm in a vehicle so that it would be out of immediate reach until the time it was needed—although that would be the result of adopting the "immediate accessibility" construction articulated by two courts of appeals.



Congress's intent is also demonstrated by its consistent use of the term "carry firearms" in dozens of statutes to refer to carrying—sometimes out of the range of immediate access—in a vehicle as well as on the person. Had Congress intended to adopt an additional "on the person" limitation, established legal terms for doing so were ready at hand. State concealed weapons statutes, for example, almost always add the qualification "on the person" and/or "in a vehicle" to their basic "carry" prohibition. Those statutes are drafted in that way precisely because the word "carry" is most naturally taken to refer to both means of carrying.

Petitioners rely on the stiff penalty scheme in Section 924(c) as an indication that Congress desired an extraordinarily narrow construction of the term "carry." That reliance is misplaced, since the severity of the penalty scheme merely shows Congress's determination to accomplish its deterrent purpose. In any event, Congress originally used the word "carry" in Section 924(c) at a time when the statute imposed much less severe sanctions. Petitioners also repeatedly argue that the fact that isolated comments in the legislative history refer to carrying on the person establishes a congressional intent to limit the statute in that way. But the fact that Section 924(c) does apply to carrying on the person, as indicated by those comments, in no way suggests that it does not apply to carrying in a vehicle. Finally, the rule of lenity can be of no assistance to petitioners here, since that rule does not require the adoption of every proffered narrow construction of each term in a criminal statute. Where, as here, the ordinary meaning of a statutory term is the only meaning that is consistent with the statutory purpose and with the way Congress

uses that term in other contexts, the rule of lenity has no application.

## ARGUMENT

### A FIREARM IS "CARRIED" WHENEVER IT IS TRANSPORTED IN A VEHICLE, REGARDLESS OF WHETHER IT IS WITHIN THE DEFENDANT'S IMMEDIATE REACH.

#### A. The Ordinary Meaning Of The Word "Carry" Includes Carrying By Vehicle As Well As On The Person

Under 18 U.S.C. 924(c), a person commits a criminal offense if that person "during and in relation to any crime of violence or drug trafficking crime * * * uses or carries a firearm." 18 U.S.C. 924(c)(1). Congress did not define "carries" in Section 924(c). The term therefore must be construed "in accord with its ordinary or natural meaning." *Smith* v. *United States*, 508 U.S. 223, 228 (1993) (analyzing "use" prong of 18 U.S.C. 924(c)); see also *Perrin* v. *United States*, 444 U.S. 37, 42 (1979) (ascribing ordinary meaning to undefined words is "[a] fundamental canon of statutory construction").

1. Major dictionaries show a remarkable unanimity in expressly referring *both* to movement via a vehicle *and* to movement on one's person in the primary definition of the term "carry." According to *Webster's New International Dictionary of the English Language* 412 (2d ed. 1958)—an authoritative dictionary that was available when Section 924(c)'s "carry" prohibition was first enacted in 1968 and on which this Court relied in *Smith*, see 508 U.S. at 228-229, and in *Bailey* v. *United States*, 516 U.S. 137, 145 (1995)—the first definition of the term "carry" is "[t]o convey, or transport, while supporting, originally in a cart or car, hence in any manner; to bear; to transfer; to transmit; to take." As that definition makes clear, not only does the term "carry" include carrying by means of a vehicle, but the term originally bore that reference as its primary meaning. See also *Webster's Third New International Dictionary, Unabridged* 343 (1986) ("carry" derived from the French "carier," meaning "to transport in a vehicle").[3]



The other major, authoritative dictionary of American English available in 1968 similarly makes clear that an item may be carried either in a vehicle or on one's person. According to *The Random House Dictionary of the English Language* 227 (1966), the first definition of the term "carry" is "to move while supporting; convey; transport." Of the two examples of usage given in that dictionary, one refers to carrying on the person ("*He carried her for a mile in his arms.*", *ibid.*) and the other refers to carrying via a vehicle ("*This elevator cannot carry more than 10 persons.*", *ibid.*). The more recent edition of the same dictionary similarly defines "carry" in terms that have clear application to carrying both in a vehicle

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[3] The most recent edition of the same dictionary similarly lists, as the first definition for "carry," a meaning that specifically refers to movement via a vehicle, as well as on one's person:

> to move while supporting (*as in a vehicle* or in one's hands or arms): move an appreciable distance without dragging: sustain as a burden or load and bring along to another place.

*Webster's Third New International Dictionary, Unabridged* 343 (1986) (emphasis added).

and on the person.[4] In short, the primary definition of the term "carry," which as the first one listed is "the most frequently encountered meaning[]," *id.* at xxix, cannot be read to have the restrictive meaning ascribed to it by petitioners, which would exclude movement on a vehicle.

It is true, as petitioners observe (96-1654 Pet. Br. 9; 96-8837 Pet. Br. 9), that the term "carry" may refer to the transportation of an object in a pocket or otherwise on one's person. That is clear from the primary definition of the term given above. But that provides no basis for arguing that Congress intended to use the term "carry" in a way that was *limited* to carrying on the person. Thus, the edition of *Webster's New International Dictionary* available in 1968 lists, as its third definition of the term "carry,"

> To support; to sustain; specif.: * * * To have or hold as a burden while moving from place to place; to have upon or about one's person; to contain; hold; bear about; as, to *carry* a wound; to *carry* an unborn child.

*Id.* at 412. The same dictionary defines "carry arms" to mean "[t]o bear weapons; to serve as a soldier." *Ibid.* Those definitions indicate that "to carry firearms" *may* refer to bearing arms on the person. They provide no support, however, for petitioners' contention that the term does *not* refer to carrying by other means, such as in a vehicle. To the contrary, the examples given ("to *carry* a wound" or "to *carry*

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[4] The first definition given is "to take or support from one place to another; convey; transport." *The Random House Dictionary of the English Language, Unabridged* 319 (2d ed. 1987). The same two examples used in the 1966 edition are repeated in the 1987 edition.



an unborn child") appear to use the word in a different sense from petitioners' "on the person" construction. And even the definition of "to carry firearms" suggests service as a soldier—once again a context that has little to do with Section 924(c).

The other major authoritative dictionary available in 1966 similarly does not support petitioners' argument. The 1966 edition of the *Random House Dictionary* lists, as the second meaning of the term, "to wear, hold, or have around one: *He carries his change in his pocket. He carries a cane.*" *Id.* at 227. That definition does not mention weapons or firearms. It thus provides no support for petitioners' contention that "carry," when used with the word "firearm" as in Section 924(c), refers only to carrying on the person and could not refer to other means of carrying as well.

2. Much the same conclusion emerges from *Black's Law Dictionary*, the authority on which petitioners place their primary reliance. Like the general purpose dictionaries cited above, the 1968 edition of *Black's* defines "carry" to refer to carrying both on the person and in a vehicle:

> To bear, bear about, sustain, transport, remove, or convey. To have or bear upon or about one's person, as a watch or weapon;—locomotion not being essential.

*Black's Law Dictionary* 269 (rev. 4th ed. 1968). That definition recognizes that firearms may be carried either on the person or through other means. It is therefore fully consistent with the definition of "carry" to include carrying in a vehicle.

Petitioners place their major reliance on an additional entry in *Black's* for the term "carry arms

or weapons." See 96-1654 Pet. Br. 10; 96-8837 Pet. Br. 10, 11 n.4, 14 n.9, 17. That entry reads:

> To wear, bear, or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person. State v. Carter, 36 Tex. 89; State v. Murray, 39 Mo. App.128.

*Black's Law Dictionary* 270 (rev. 4th ed. 1968).[5] Of course, the fact that "carry" may be used in this sense in no way suggests that Congress intended this to be the *exclusive* meaning of the word, nor does *Black's Law Dictionary* so imply. But in any event, the two cases cited in the *Black's Law Dictionary* entry demonstrate that the entry was not intended to be authority for the argument that the word "carry," as used in Section 924(c), refers *solely* to carrying on the person.

In both of the cases cited in the *Black's Law Dictionary* entry for "carry arms or weapons," a defendant was convicted under a nineteenth century statute that, as is typical of state concealed weapons statutes both at that time and today, see pp. 34-39, *infra*, expressly prohibited carrying concealed weapons *on the person*. See *State* v. *Murray*, 39 Mo. App. 127, 128 (1890) ("The defendant was indicted * * * for carrying concealed *upon his person* a dangerous and deadly weapon.") (emphasis added); Mo. Rev. Stat.

[5] The quoted definition is from the edition of *Black's Law Dictionary* that was available in 1968, when Section 924(c) was enacted. The most recent, 1990 edition, which petitioners cite instead, gives an identical definition, but it omits the case citations. As we discuss in text below, those citations are of great value in understanding the definition.



§ 3502 (1889) (statute prohibiting a person from "carry[ing] concealed *upon or about his person* any deadly or dangerous weapon") (emphasis added); *State* v. *Carter*, 36 Tex. 89, 89 (1871) (defendant indicted for carrying a weapon "about his person"); 1879 Tex. Crim. Stat. tit. IX, art. 318 (Penal Code) (statute prohibiting a person from "carry[ing] *on or about his person*, saddle, or in his saddle bags, any pistol") (emphasis added). By expressly qualifying the word "carry" with the term "on or about his person" or "upon his person," the legislatures that enacted those statutes showed the common understanding that the term "carry," as used in Section 924(c) without that qualification, would have a broader meaning. The *Black's Law Dictionary* entry may provide useful guidance in cases involving other issues about the meaning of the word "carry."[6] But it provides no support whatever for petitioners' claim that "carry," as used in Section 924(c) without the qualifying phrase "on the person," is nonetheless limited to carrying on the person.[7]

[6] For example, *Murray* involved the legal question whether the Missouri statute required proof that the defendant had the "intention to use [the firearm] as a weapon." 39 Mo. App. at 131. *Carter* involved the question whether an allegation in an indictment that the defendant "did have about his person a certain pistol" was sufficient under the Texas statute if it "did not charge that * * * defendant did 'carry' the weapon." 36 Tex. at 89. The holding in *Carter* that it did supports the indisputable fact that a firearm may be carried on the person. It does not, however, provide any support for petitioners' contention that a firearm may not be carried by other means—such as in a vehicle.

[7] An earlier edition of *Black's Law Dictionary* lists three additional cases in the entry for "carry arms or weapons." *Black's Law Dictionary* 283 (3d ed. 1933). Those cases simi-

3. No court of appeals has adopted petitioners' construction of "carry" to include only carrying on the person and to exclude carrying in a vehicle. And most courts to reach the issue have concluded, like the courts below, that "carry" in Section 924(c) is used in its ordinary sense and can refer to a variety of means of carrying, such as carrying on the person and carrying in a vehicle.[8] Two courts of appeals,

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larly make clear that the entry should not be taken as authority for petitioners' argument. One of them, *State* v. *Roberts*, 39 Mo. App. 47 (1890), was brought under the same "upon the person" concealed weapons statute as *Murray*, and it involved a similar question regarding whether the defendant had to be shown to have the intent to carry the firearm for use as a weapon. The second cited case, *Owen* v. *State*, 31 Ala. 387 (1857), involved a prosecution brought under a statute that prohibited a person from "carry[ing] concealed *about his person* a pistol." *Id.* at 388 (emphasis added). The third cited case, *Moorefield* v. *State*, 73 Tenn. 348 (1880), arose under a statute that provided that "[n]o person shall publicly ride or go armed to the terror of the people; or privately carry any dirk, large knife, pistol, or any other dangerous weapon, to the fear or terror of any person." Tenn. Comp. Stat. § 4753 (Thompson & Steger eds., 1873). The case involved the question whether the defendant, who was armed with a pistol "for the purpose of joining in a chase for bear," could be said to have been acting "for evil purposes, or for the purpose of being armed, in the sense of the statute." 73 Tenn. at 348-349. The statute at issue does not use the term "carry," and the report does not specify how the defendant carried the pistol and whether he walked or used some other means of transportation to hunt the bear. As in the later edition of *Black's*, these citations establish that the dictionary entry was not intended to address whether the term "carry firearms" refers to carrying in a vehicle, as well as on the person.

[8] Aside from the First and Fifth Circuits in the instant cases, the Seventh, Fourth, Tenth, and Eleventh Circuits have taken this position. See, *e.g.*, *Wilson* v. *United States*, 125 F.3d



however, have concluded that, although Section 924(c) is not limited to carrying on the person, its application is limited to weapons that are immediately accessible or that satisfy a similar locution.[9] Petitioners suggest that, as an alternative to their entirely novel limitation on the term "carry" in Section 924(c) to mean "carry on the person," this Court could adopt the minority immediate accessibility limitation. See 96-1654 Pet. Br. 20-22; 96-8837 Pet. Br. 43-49.

No definition of "carry" in any dictionary supports the proposition that the word refers only to items—whether firearms or otherwise—that are immediately accessible. It is no doubt true that a weapon that is carried on the person will ordinarily be more or less

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1087, 1092 (7th Cir. 1997) ("We disagree with and cast aside the 'immediate access' theory as espoused by the Second, Sixth, and Ninth Circuits."); *United States* v. *Mitchell*, 104 F.3d 649, 653 (4th Cir. 1997) ("[T]he plain meaning of the term 'carry' * * * requires knowing possession and bearing, movement, conveyance, or transportation of the firearm in some manner."); *United States* v. *Miller*, 84 F.3d 1244, 1259 (10th Cir. 1996) ("[T]he government is required to prove only that the defendant transported a firearm in a vehicle and that he had actual or constructive possession of the firearm while doing so."), cert. denied, 117 S. Ct. 443 (1997); *United States* v. *Quinn*, 123 F.3d 1415, 1426, 1428 (11th Cir. 1997) (government must prove only "actual transporting" of firearm under carry prong; immediate availability requirement rejected).

[9] See *United States* v. *Foster*, No. 89-10405, 1998 WL 2521, *5 (9th Cir. Jan. 5, 1998) (en banc) ("immediately available"); *United States* v. *Cruz-Rojas*, 101 F.3d 283, 285 (2d Cir. 1996) ("within reach"). The Sixth Circuit had taken the position that immediate accessibility is required, see, *e.g.*, *United States* v. *Riascos-Suarez*, 73 F.3d 616, cert. denied, 117 S. Ct. 136 (1996), but the issue is currently under *en banc* submission in that circuit. *United States* v. *Malcuit*, 104 F.3d 880, vacated and rehearing en banc granted, 116 F.3d 163 (1997).

accessible. Nonetheless, even in the case of carrying on the person, a weapon may be carried though its accessibility is quite limited. For example, it would ordinarily be said that a person who places a weapon in a locked briefcase and then takes the briefcase in his hand as he walks down the street has "carried" the weapon. Cf. *State* v. *Molins*, 424 So. 2d 29, 30 (Fla. Dist. Ct. App. 1982) (gun encased in zippered gun bag enclosed in zippered canvas bag held to be "carried"); *Nardo* v. *State*, 819 P.2d 903, 905-906 (Alaska Ct. App. 1991) ("case law from around the country supports the proposition that a person who carries a deadly weapon in a purse, a briefcase, or even a paper bag commits the offense of carrying a concealed weapon"). Immediate accessibility is not a criterion of whether the weapon is carried—either in a vehicle or on the person.[10]

Indeed, contrary to the petitioners' alternative view, the immediate accessibility requirement requires "the obviously foolish conclusion" that if an object is not within reach, "the individual is no longer carrying the object, but is doing something else." *United States* v. *Miller*, 84 F.3d 1244, 1260 (10th Cir.), cert. denied, 117 S. Ct. 443 (1996). Adopting that conclusion would be directly contrary to the way the term is ordinarily used. For example, it would be perfectly natural for the driver of a car to say that he

[10] As the First Circuit noted, see 96-8837 J.A. 110, the location of the firearm in a vehicle and its accessibility to the defendant (although not necessarily at the moment of arrest) may be relevant under some circumstances in determining whether the "in relation to" element of Section 924(c) is satisfied. See *United States* v. *Miller*, 84 F.3d 1244, 1260 (10th Cir.), cert. denied, 117 S. Ct. 443 (1996). It has no bearing, however, on whether the weapon is "carried."



"carries" a spare tire in his trunk or a flashlight in his glove compartment for use in emergencies, regardless of the fact that those items may be thought not to be immediately accessible to the driver or a passenger. But cf. p. 43, *infra*. Neither petitioners nor any standard reference offers any reason to believe that the Congress that enacted Section 924(c) intended that the term "carries" in Section 924(c) should be construed in any more limited sense.

4. Petitioners contend (96-8837 Pet. Br. 19-20) that because Congress used the terms "possess" and "transport" in other firearms provisions, it thereby "precluded a broad definition of the term 'carry' that would be synonymous with either 'transportation' or 'possession.'" See also 96-1654 Pet. Br. 13-14. We do not urge, however, a meaning for the term "carry" that is interchangeable with either "possess" or "transport."

We do not argue that carrying a firearm in a vehicle is in any way synonymous with possessing it. A person may possess a firearm without touching it, moving it, bearing it, or carrying it; that is the focus of "possession" statutes like 18 U.S.C. 922(g), which makes it illegal for felons and others to "possess" firearms. It is true that, under any view of the meaning of the word "carry," the act of carrying a firearm—whether on the person or in a vehicle—also involves possession of it. But, under both petitioners' view and ours, proof of possession alone does not amount to proof of carrying.[11]

[11] Petitioners argue (96-8837 Pet. Br. 36) that "[i]n the context of a moving vehicle," our "definition of 'carry' swallows entirely any meaningful role for 'use,' since *any* possession of the firearm under that definition constitutes 'carrying.'" Of

As the dictionary definitions cited above demonstrate, "carry" and "transport" are closely related. The terms do, however, have different connotations, such that Congress wisely chose to use each term in an appropriate setting in the federal gun control statutes. A leading dictionary of synonyms explains:

> **Carry, bear, convey, transport, transmit** come into comparison when they mean to be, or to serve as, the agent or the means whereby something (or someone) is moved from one place to another. **Carry** originally and still often implies the use of a cart or carriage (now a train, ship, automobile, airplane or the like * * *) but it may imply a personal agent * * * **Transport** is used in place of *carry* or *convey* when the stress is on the movement of persons or goods from one place to another, as in vessels or in railway trains.

*Webster's Dictionary of Synonyms* 141 (1st ed. 1942). Thus, the word "transport" is most often used when the emphasis is on bare movement, bulk goods, and common carriers, while the broader term "carry"

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course, the same could be said of petitioners' theory: in the context of a moving person, petitioners' definition of "carry" swallows entirely any meaningful role for "use," since *any* possession of the firearm on a moving person constitutes "carrying." The point is that, under both definitions, there will be cases in which the firearm is used but not carried (when, for example, it is purposely displayed by a drug dealer conducting a transaction at his home), and cases in which it is carried but not used (when, for example, it is borne on the person or—in our view—in a vehicle). Cf. *Bailey*, 516 U.S. at 146 (interpreting "use" to require "active use" so that each term in statute has "a particular, nonsuperfluous meaning").



emphasizes personal agency and movement either on a vehicle or by hand.[12]

Those distinctions amply explain Congress's use of "transport" in Section 924(b) and other related statutes, but not in Section 924(c). Section 924(b) makes it a crime for any person to "ship[], transport[], or receive[] a firearm or any ammunition in interstate or foreign commerce" with the "intent to commit therewith" a serious offense or with "cause to believe that a[] [serious] offense * * * is to be committed therewith." 18 U.S.C. 924(b). The emphasis of that provision, therefore, "is on the movement of [firearms] from one place to another," specifically, in interstate or foreign commerce. *Webster's Dictionary of Synonyms* 141 (1st ed. 1942). Hence, a paradigmatic violation of Section 924(b) might involve a defendant placing firearms in a box and sending them by mail to a confederate in another state—conduct that in common parlance is most accurately described as "transporting" the firearms. By contrast, a paradigmatic violation of Section 924(c) involves a defendant who brings a firearm with him to the site of a drug deal. If the defendant does so in a vehicle, the defendant would be said to be carrying the firearm, not transporting it,

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[12] See also *Random House Dictionary of the English Language* 227 (1966) (noting that "transport" means to carry goods "usually by vehicle or vessel," while "carry" "means to take by means of the hands, of a vehicle, etc."); *Webster's Third New International Dictionary, Unabridged* 343 (1986) ("carry" means "moving to a location some distance away while supporting or maintaining off the ground" and "is a natural word to use in ref. to cargoes and loads on trucks, wagons, planes, ships, or even beasts of burden," while "transport refers to carriage in bulk or number over an appreciable distance and, typically, by a customary or usual carrier agency").

just as a person who brings a spare tire or flashlight with him in a vehicle would be said to be carrying those items, not transporting them. Congress chose in Sections 924(b) and 924(c) the verb which was most nearly suited to capture the run of cases. The use of the term "transport" in Section 924(b) and in some other statutes provides no basis for this Court to impose an additional requirement for "carrying" that finds no basis in the plain meaning of the term.

### B. The Legislative History Of Section 924(c) Supports The Application Of That Prohibition To Carrying In A Vehicle As Well As On The Person

The legislative purpose underlying Section 924(c), as authoritatively expressed by the sponsor of the legislation and repeated during the debate surrounding its passage, is to encourage those who would commit the predicate offenses to leave their guns at home. That purpose would be disserved by petitioners' addition of an "on the person" element to the statute. On the other hand, Congress's purpose is precisely consonant with the ordinary meaning of the word "carries" to encompass carrying both on the person and in a vehicle.

1. As originally enacted in the Gun Control Act of 1968, Section 924(c) imposed criminal penalties providing that anyone who

> (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States, shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years.



Pub. L. No. 90-618, § 102, 82 Stat. 1224.[13] Because the provision was offered as an amendment on the House floor, it was not the subject of any hearings or committee reports. See 114 Cong. Rec. 22,231 (1968); *Simpson* v. *United States*, 435 U.S. 6, 13 & n.7 (1978). The amendment's sponsor, Representative Poff, explained the amendment at some length when he introduced it. This Court has commented that Representative Poff's comments are "probative" and "entitled to weight" as an exposition of the statute's purposes. *Simpson*, 435 U.S. at 13. See also *id.* at 14; *Busic* v. *United States*, 446 U.S. 398, 405 (1980) (relying on "crucial material" encompassed in Rep. Poff's comments in construing Section 924(c)). His comments are inconsistent with petitioners' position in this case.

One of the crucial features of the Poff amendment, which became Section 924(c), was the one-year mandatory minimum sentence. That minimum was referred to repeatedly in the House debate, and it was central to Congress's choice of the Poff amendment over competing measures that were under consideration. In describing the impact of this crucial feature of his amendment, Rep. Poff explained that "[t]he effect of a minimum mandatory sentence in this case *is to persuade the man who is tempted to commit a Federal felony to leave his gun at home.*" 114 Cong. Rec. 22,231 (1968) (emphasis added). That comment was echoed by others during the debate. See *id.* at 22,242 (noting resolution of local group of law enforcement personnel "that carrying short firearms in motor ve-

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[13] The statute provided for enhanced penalties of five to twenty five years for second and subsequent convictions. § 102, 82 Stat. 1224.

hicles be classified as carrying such weapons concealed") (Rep. May), 22,243-22,244 (statutes would apply to "the man who goes out taking a gun to commit a crime") (Rep. Hunt), 22,244 ("Of course, what we are trying to do by these penalties is to persuade the criminal to leave his gun at home.") (Rep. Randall); see also *id.* at 22,236 ("We are concerned * * * with having the criminal leave his gun at home.") (Rep. Meskill).[14] As this Court explained in *Smith*, 508 U.S. at 240, Congress directed Section 924(c) at the "dangerous combination" posed by drugs and guns.

The Poff amendment was not intended to persuade defendants, if they wanted to take guns with them, to be sure to put them on the seat, in the glove compartment, or in the trunk of a vehicle. Rather, the expressed purpose of the statute was to persuade those who intend to commit such crimes "to leave [their] gun at home." 114 Cong. Rec. 22,231 (1968). To read

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[14] Discussing the fact that the Poff Amendment was limited to those who carried a gun unlawfully, Rep. Meskill stated that Section 924(c) "should apply to every person whether he carries a gun lawfully or unlawfully, if he commits a Federal felony *while he has a firearm on his person*." 114 Cong. Rec. 22,236 (1968) (remarks of Rep. Meskill) (emphasis added). That casual statement, however, by a Member who was not a sponsor or leading supporter of the Poff amendment, likely reflects nothing more than an assumption about how guns are frequently "carried," rather than the improbable judgment that that is the *only* way they may be carried. And in any event, Rep. Meskill also used broader language, stating that Congress should not create a class of people "who can go out with firearms *in their possession*, commit Federal felonies, and be immune from the provisions of [Section 924(c)]." *Ibid.* (emphasis added). That broader wording undercuts any significance that might otherwise attach to Rep. Meskill's use of the phrase "on his person."



into Section 924(c) an additional element requiring that the firearm be carried on the person—or even to add that the gun must have been immediately accessible to the defendant—would do violence to that purpose. The means by which the gun would be carried—whether on the person or in a vehicle—was irrelevant to the Congress that enacted the statute.

Indeed, the facts of these cases demonstrate that a gun carried in a vehicle—even in a manner that renders it arguably less than immediately accessible—presents precisely the "grave possibility of violence and death," *Smith*, 508 U.S. at 240, that Congress sought to prevent in enacting and subsequently amending Section 924(c)(1). Petitioner Cleveland and Gray-Santana admitted that they planned to steal drugs from drug dealers and, after arranging a meeting, procured guns, rope, and duct tape, and put all of those items in a bag in the trunk of their car. See pp. 6-7, *supra*. Because they were arrested at the rendezvous with the drug dealers but before they had the opportunity to consummate their plan, the guns were not immediately accessible at the time of arrest. Nonetheless, they undoubtedly carried the guns in their car during and in relation to a drug trafficking crime, and that carrying presented precisely the dangers of violence that would have been presented had they carried the guns in the same bag but proceeded on foot. Similarly, petitioner Muscarello had the gun available in his glove compartment for "protection" during his drug deals, see 96-8837 J.A. 12; he could have retrieved it at any moment to initiate or escalate the violence that all too frequently accompanies drug transactions. These scenarios are typical of cases arising under the "carry" prong of Section 924(c). Congress enacted Section 924(c) in order to deter

offenders from carrying guns in the ways petitioners did in these cases.

2. There is nothing elsewhere in the legislative history that contradicts Rep. Poff's statement regarding the statute's purpose or that indicates a congressional desire to limit the ordinary term "carry" to one particular means of carrying. As petitioners note (96-1654 Pet. Br. 18; 96-8837 Pet. Br. 33-34), a few Members of Congress referred to examples of individuals carrying guns on their persons during the debate over the Poff Amendment. In 1984, when Congress amended Section 924(c) in several significant respects as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, ch. X, § 1005(a), 98 Stat. 2138-2139,[15] the Senate Report similarly gives an example of "carrying" that refers to carrying on the person.[16] Those examples amply sup-

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[15] Following the 1984 amendment, Section 924(c) read in pertinent part as follows:

> Whoever, during and in relation to any crime of violence, including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years.

98 Stat. 2138.

[16] The report stated that "the requirement that the firearm's use or possession be 'in relation to' the crime would preclude its application in a situation where its presence played no part in the crime, *such as a gun carried in a pocket* and never displayed or referred to in the course of a pugilistic barroom fight." S. Rep. No. 225, 98th Cong., 1st Sess. 314 n.10 (1983) (emphasis added).



port the proposition on which we and petitioners agree—that one may violate the statute by carrying a firearm on his person. None of the comments, however, suggests that Congress—or, indeed, that any member of Congress—believed that that would be the *only* means of carrying that the statute prohibits. See *Wilson* v. *United States*, 125 F.3d 1087, 1090 (7th Cir. 1997). Nor do any of the cited comments suggest that Congress's purpose in enacting the statute was anything other than what Rep. Poff said it was.

In *Smith*, this Court considered and rejected an argument analogous to that advanced by petitioners here. It was argued in *Smith* that "use" of a firearm refers only to "the most familiar use to which a firearm is put—use as a weapon," and that use of a firearm in barter for drugs was accordingly not covered by Section 924(c). 508 U.S. at 230. Finding a "significant flaw" in that argument, *ibid.*, the Court held that "[b]oth a firearm's use as a weapon and its use as an item of barter fall within the plain language of § 924(c)(1)." *Id.* at 240. As the Court explained, "[t]hat one example of 'use' is the first to come to mind when the phrase 'uses . . . a firearm' is uttered does not preclude [the Court] from recognizing that there are other 'uses' that qualify as well." *Id.* at 230. Similarly, the recognition by Members of Congress that a firearm may be carried on the person does not lead to petitioners' conclusion that Congress intended to exclude other means of carrying from the scope of the statute. As discussed above, the purpose of the statute and its plain language are quite to the contrary.

3. The enactment history of Section 924(c) also disposes of another of petitioners' contentions. Petitioners argue (96-1654 Pet. Br. 15-16; 96-8837 Pet. Br. 26-29) that the mandatory minimum five-year

sentence—which may be enhanced depending on the type of firearm and whether the offense is a repeat offense—imposed for violations of Section 924(c) militates in favor of limiting the statutory prohibition to cases in which the firearm is carried on the person. On that basis, petitioners argue that Congress would have wanted such a severe sanction to be limited to a relatively small number of cases.

Petitioners' reasoning is unsound. Congress no doubt specified severe sanctions for violations of Section 924(c) because Congress wanted sufficient deterrence "to persuade the man who is tempted to commit a Federal felony to leave his gun at home," in Representative Poff's words. 114 Cong. Rec. 22,231 (1968). Although petitioners may disagree with Congress's policy judgment on that point, that disagreement does not provide a basis to limit the statute's reach by engrafting on to it an "on the person" element.

In any event, the penalties to which petitioners refer would be a particularly unsound foundation for interpretation of the term "carries" in the statute. At the time Congress enacted the original "carries a firearm" prohibition in Section 924(c) in 1968, the penalties to which petitioners refer were not part of the statute. Instead, the statute was enacted with a more flexible penalty scheme that provided for a sentence of one to ten years' imprisonment for a first offense, with a sentence of five to twenty-five years for a second or subsequent offense. § 102, 82 Stat. 1224. It would be highly anachronistic to base any construction of the term "carries" in Section 924(c) on a penalty scheme that was added many years after



the basic prohibition on "carr[ying] a firearm" was included in the statute.[17]

### C. A Comparison Of Section 924(c) To Other Statutory Models Supports A Construction Of "Carry" To Cover Carrying In A Vehicle

It is a cardinal principle of statutory construction that language used in a statute should be read to harmonize with similar usages in related bodies of law. *Reno* v. *Koray*, 515 U.S. 50, 56-57 (1995); *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 407-408 (1991). Here, that principle is significant because the word "carry" appears in numerous firearms laws that plainly reach carrying in a car. Moreover, Congress had available to it, but chose not to employ, a well-established model—state concealed weapons statutes—had it wished to impose the "on the person" limitation petitioners support.

1. In other statutes, Congress frequently uses the word "carry" in its ordinary meaning to refer to

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[17] Petitioners also argue (96-1654 Pet. Br. 16; 96-8837 Pet. Br. 29) that Sentencing Guidelines § 2D1.1(b)(1), which provides for a two-level enhancement if a firearm is "possessed" during a drug trafficking crime, is of relevance to the analysis. Congress's intent in using the term "carries" in Section 924(c) in 1968, however, cannot be illuminated by reference to a Guidelines provision first adopted by the Sentencing Commission decades later. In any event, the Guidelines provision addresses a far broader set of circumstances than does Section 924(c). In order to qualify for the enhancement, it need not be shown that the defendant either used a firearm or carried it (on the person or otherwise) and it need not be shown that it was "during and in relation to" a drug trafficking offense; the Guidelines enhancement applies if the defendant merely "possessed" the firearm, "unless it is clearly improbable that the weapon was connected with the offense." Guidelines § 2D1.1 comment., appl. note 3.

carrying both on the person and in a vehicle. There are at least 34 federal statutes that authorize various federal law enforcement and security agents "to carry firearms."[18] Among those covered by such authorizations are many categories of agents who can be expected to make extensive use of vehicles, such as

[18] These include 7 U.S.C. 2270 (agents employed by Inspector General of Department of Agriculture), 7 U.S.C. 2274 (Department of Agriculture quarantine agents), 8 U.S.C. 1357(a) (INS agents), 10 U.S.C. 1585 (civilian investigative officers of Department of Defense), 14 U.S.C. 95 (civilian special agents of the Coast Guard), 16 U.S.C. 1a-6(b) (National Park Service agents), 16 U.S.C. 559c(1) (Forest Service agents), 16 U.S.C. 831c-3(b)(2)(D) (TVA law enforcement agents), 16 U.S.C. 3375(b) (fish and wildlife agents), 18 U.S.C. 3050 (Bureau of Prisons agents), 18 U.S.C. 3052 (FBI agents), 18 U.S.C. 3053 (U.S. Marshals), 18 U.S.C. 3056(c)(1)(B) (Secret Service agents), 18 U.S.C. 3061(a)(4) (Postal Inspectors), 18 U.S.C. 3063(a)(1) (EPA agents), 18 U.S.C. 3603(9) (probation officers), 19 U.S.C. 1589a(1) (Customs Service agents), 21 U.S.C. 372(e)(1) (FDA investigators and inspectors), 21 U.S.C. 878(a)(1) (DEA agents), 22 U.S.C. 2709(a)(4) (Department of State and Foreign Service special agents), 25 U.S.C. 2803(1) (Bureau of Indian Affairs agents), 26 U.S.C. 7608(a)(1) (IRS and ATF agents), 28 U.S.C. 566(d) (U.S. Marshals Service), 38 U.S.C. 902(b)(3) (Department of Veterans Affairs police officers), 40 U.S.C. 13n(a)(5) (Marshal of the Supreme Court and Supreme Court Police), 40 U.S.C. 318d (GSA special police), 42 U.S.C. 2201(k) (Nuclear Regulatory Commission agents), 42 U.S.C. 2456 (NASA agents), 42 U.S.C. 7270a(1) (Strategic Petroleum Reserve guards), 43 U.S.C. 1733(c)(1) (local law enforcement agents under authority of Bureau of Land Management), 49 U.S.C. 44,903(d)(1) (air transportation security agents), 50 U.S.C. 403f(d) (CIA agents), 50 U.S.C. App. 2411(a)(3)(B)(iii) (export enforcement agents). See also Congressional Operations Appropriations Act, Pub. L. No. 104-53, Tit. III, § 313(a), 109 Stat. 538 (Sergeant at Arms of the House of Representatives).



agents of the FBI, 18 U.S.C. 3052, the Secret Service, 18 U.S.C. 3056(c)(1)(B), and the CIA, 50 U.S.C. 403f(d).

These statutes establish that Congress typically and regularly uses the phrase "carry firearms" to include a variety of means by which firearms may be carried. The obvious purpose of the authorization to carry firearms is to ensure that federal agents who require firearms to perform their functions may carry them on their persons, in vehicles, or by whatever means is appropriate, without regard to restrictive state or local gun control regulations. Yet, under petitioners' view, these authorization statutes would contain inexplicable gaps. Congress would have intended to authorize federal law enforcement agents to carry their guns on their persons, but not to authorize them to remove such guns upon entering a car and lay them on the seat, place them in a locked glove compartment, or put them in the trunk. That is not a plausible view of Congress's intent.[19]

[19] Other federal statutes similarly make clear that Congress typically uses similar phrases without restriction to refer to a variety of means by which weapons can be carried. For example, under 15 U.S.C. 5902(a), a crew member of an armored car company licensed by one State "to carry a weapon * * * shall be entitled to lawfully carry any weapon to which such license relates in any State while such crew member is acting in the service of such company." Under petitioners' view, Congress would thereby have required reciprocity among States only when the crew member carries a weapon on the person; if the crew member lays it down or otherwise stores it in the armored car, the statute would have no application. See also 18 U.S.C. 844(h)(2) (enhanced penalty for a person who "carries an explosive during the commission of any felony which may be prosecuted in a court of the United States"); 18 U.S.C. 967 (authority during wartime in which United States is neutral to forbid vessel to sail if vessel is reasonably believed "to carry

The authorization statutes also establish that no implicit "immediately accessible" qualification should be engrafted on to the statutory term "carry firearms." Congress could not have intended to authorize federal law enforcement agents to carry firearms only if the firearms may be viewed as being immediately accessible. To the contrary, there are circumstances in which it would be far safer for an agent to keep a firearm securely stowed in a locked glove compartment or trunk of a car than to keep it in a more immediately accessible location. Congress surely did not intend to withhold its authorization from such prudent practices.

2. Numerous state concealed weapons statutes similarly demonstrate that the word "carry," used in conjunction with a reference to firearms or other weapons, has a clear legal meaning, and that that meaning is entirely in accord with the ordinary meaning of the word "carry" to include carrying on the person and in a vehicle. Although it is difficult to summarize the wide variety of state statutes on the subject,[20] it appears that 24 States and the District of

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fuel, arms, ammunition, men, supplies, dispatches, or information"). Of course, a great many statutes that use the word "carry" or its derivatives without mention of firearms are clearly intended to include carrying in vehicles. See, *e.g.*, 18 U.S.C. 32(a)(4) (prohibiting placing destructive device in proximity to "any cargo carried or intended to be carried on any * * * aircraft"); 18 U.S.C. 659 ("The carrying * * * of any [converted property] in interstate or foreign commerce * * * shall constitute a separate offense."); 18 U.S.C. 1694 (making it a crime for someone who has charge of a conveyance over which the mail "is regularly carried" to "carr[y], otherwise than in the mail, any letters or packets").

[20] Categorizing the state statutes is difficult in part because States often have overlapping prohibitions that impose differ-



Columbia prohibit carrying a firearm (usually, a concealed firearm) by expressly using a phrase such as "on or about the person" or the like.[21] The use of the

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ent requirements on carrying different sorts of weapons in different circumstances. For example, in addition to the "concealed upon or about his person" statute cited in note 21, *infra*, Maryland also has a statute making it a crime to "wear, carry, or transport any handgun, whether concealed or open, upon or about his person" and to "wear, carry or knowingly transport any handgun, whether concealed or open, in any vehicle." Md. Ann. Code of 1957, art. 27, § 36B(b) (1996 & Supp. 1997). In addition, many States have statutes prohibiting the carrying of firearms in game preserves, etc. See, *e.g.*, S.C. Code Ann. § 16-23-20 (Law. Co-op. 1985) (unlawful "to take, attempt to take, or hunt" raccoons, opossums, or fox "when carrying on one's person or in one's vehicle a firearm"); Wash. Rev. Code Ann. § 77.16.110 (West 1996 & Supp. 1998) ("unlawful to carry firearms * * * upon a game reserve, except on public highways"). Those statutes are generally consistent with our view that the term "carry" is used without qualification to refer to carrying both in a vehicle or on the person, but we have not attempted an extensive categorization of such statutes. See also, *e.g.*, *Commonwealth* v. *Bigelow*, 378 A.2d 961 (Pa. Super. Ct. 1977) (prosecution for carrying in vehicle under statute prohibiting "carry[ing] a firearm * * * upon the public streets").

[21] Ala. Code § 13A-11-50 (1994 & Supp. 1997) ("carries concealed about his person"); Colo. Rev. Stat. Ann. § 18-12-105 (Bradford 1986 & Supp. 1996) ("[c]arries a firearm concealed on or about his or her person"); Conn. Gen. Stat. Ann. § 53-206 (West 1994) ("carries upon his person"); Del. Code Ann. tit. 11, §§ 1442, 1443 (1995) ("carries * * * upon or about the person"); D.C. Code Ann. § 22-3204 (1996) ("carry * * * on or about their person"); Fla. Stat. Ann. § 790.01 (West 1992 & Supp. 1998) ("carry * * * on or about his person"); Ga. Code Ann. § 16-11-126 (1996 & Supp. 1997) ("carries about his or her person"); Idaho Code § 18-3302(1) and (14) (1997) (authorizing licenses to "carry a weapon concealed on his person" and prohibiting unlicensed carrying); Kan. Stat. Ann. § 21-4201(4)

qualifying "on the person" phrase in all of these statutes would be inexplicable under petitioners' view, since petitioners' essential claim is that the qualification "on the person" is implicit in each such statute. These statutes demonstrate that, where a legislature intends to limit a "carry firearms" statute to carrying on the person, the conventional mode of accom-

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(1995 & Supp. 1996) ("carrying * * * concealed on one's person"); Ky. Rev. Stat. Ann. § 527.020 (Michie 1990 & Supp. 1996) ("carries * * * on or about his person"); La. Rev. Stat. Ann. § 14:95(A)(1) (West 1986) ("intentional concealment * * * on one's person"); Me. Rev. Stat. Ann. tit. 25, § 2001 (West 1988) ("conceal about his person"); Md. Ann. Code of 1957, art. 27, § 36(a)(1) (1996) ("wear or carry * * * concealed upon or about his person"); Mo. Ann. Stat. § 571.030.1(1) (West 1995) ("carries concealed upon or about his person"); Mont. Code Ann. § 45-8-316 (1997) ("carries or bears concealed upon his person"); Neb. Rev. Stat. § 28-1202(1) (1995) ("carries * * * concealed on or about his or her person"); Nev. Rev. Ann. Stat. § 202.350.1(b) (Michie 1997) ("carry concealed upon his person"); N.M. Stat. Ann. § 30-7-1-2 (Michie 1994) ("carrying" means "having it on the person, or in close proximity thereto, so that the weapon is readily accessible for use"); N.C. Gen. Stat. § 14-269(a) (1993 & Supp. 1997) ("carry concealed about his person"); Ohio Rev. Code Ann. § 2923.12(A) (Anderson 1996) ("carry or have, concealed on his or her person or concealed ready at hand"); Okla. Stat. Ann. tit. 21, §§ 1272, 1290.4 (West 1983 & Supp. 1998) ("carry upon or about his person, or in a purse or other container belonging to the person"); S.C. Code Ann. § 16-23-20 (Law. Co-op. 1985) ("carry about the person"); Tex. Penal Code Ann. § 46.02(a) (West 1994) ("carries on or about his person"); Va. Code Ann. § 18.2-308 (1996) ("carries about his person"); W. Va. Code §§ 61-7-2(10), 61-7-3 (1997) (prohibiting "carr[ying] a concealed deadly weapon" and stating that "[a] deadly weapon is concealed when it is carried on or about the person" so that another person would not be on notice of its presence).



plishing that end is to say so specifically in the language of the statute.[22]

An additional 15 States prohibit carrying a firearm by using both an "on or about the person" qualification and an "in a vehicle" qualification.[23] Many of

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[22] Frequently States construe the statutory phrase "about the person" in a concealed weapons statute to impose an "immediate accessibility" requirement. See, *e.g.*, *State* v. *McNary*, 596 P.2d 417, 420 (Idaho 1979) (citing cases holding that carrying "upon or about [the] person" includes "not only when [the defendant] physically is carrying it in his clothing or in a handbag of some sort, but also when he goes about with the weapon in such close proximity to himself that it is readily accessible for prompt use"). The "immediate accessibility" requirement in any event is consistent with a major purpose of concealed weapons statutes, the "common thrust" of which is "to protect the public by preventing an individual from having on hand a deadly weapon of which the public is unaware, and which may be used in a sudden heat of passion." *State* v. *McAdams*, 714 P.2d 1236, 1238 (Wyo. 1986); see 79 Am. Jur. 2d *Weapons and Firearms* § 8, at 12 (1975). As we have argued above, the purpose of Section 924(c)—to deter those who would deal drugs from bringing their guns with them—would be disserved by adding that requirement.

[23] See Ariz. Rev. Stat. Ann. § 13-3102 (West 1989 & Supp. 1997) ("[c]arrying a deadly weapon without a permit * * * concealed on his person; or * * * concealed within immediate control of any person in or on a means of transportation"); Ark. Code Ann. 5-73-120 (Michie 1993 & Supp. 1995) ("A person commits the offense of carrying a weapon if he possesses a handgun * * * on or about his person, in a vehicle occupied by him, or otherwise readily available for use with a purpose to employ it as a weapon against a person"); Cal. Penal Code § 12,025 (West 1992 & Supp. 1998) ("[c]arries concealed within any vehicle * * * [or] * * * concealed upon his or her person"); Haw. Rev. Stat. Ann. §134-51 (Michie 1995 & Supp. 1997) ("carries * * * upon the person's self or within any vehicle used or occupied by the person"); 720 Ill. Comp. Stat.

these statutes specifically refer to carrying in a vehicle because they limit the prohibition somewhat differently in that setting—frequently including some kind of immediate accessibility requirement—than when the weapon is carried on the person. For example, the Arizona statute prohibits "[c]arrying a deadly weapon * * * concealed on his person; or * * * concealed within immediate control of any person in or on a means of transportation." Ariz. Rev. Stat. Ann. § 13-3102 (West 1989 & Supp. 1997). But these statutes too, like those that merely prohibit carrying "on the person," demonstrate the ordinary understanding of state legislatures that a weapon may be carried either on the person or in a vehicle.

Finally, five States appear simply to prohibit the carrying of concealed weapons, with no "on the person" or "in a vehicle" qualification.[24] Of those five States, three have construed their statutes to prohibit carrying in automobiles, as well as on the person.[25] The other two States appear never to have considered the question whether the term "carries" includes carrying in a vehicle.[26] No State—indeed, no

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Ann. § 5/24-1(4) (West 1993) ("[c]arries or possesses in any vehicle or concealed on or about his person"); Ind. Code Ann. § 35-47-2-1 (Michie 1994) ("carry * * * in any vehicle or on or about his person"); Mich. Stat. Ann. § 28.424 (Law. Co-op. 1990) ("carry * * * on or about his or her person, or * * * in any vehicle"); Minn. Stat. Ann. § 624.714 (West 1987 & Supp. 1998) ("carries, holds or possesses * * * in a motor vehicle * * * or on or about the person's clothes or the person"); N.H. Stat. Ann. § 159:4 (Michie 1994 & Supp. 1997) ("carry * * * in any vehicle or concealed upon his person"); N.D. Cent. Code §§ 62.1-02-01, 62.1.02-02, 62.1-02-10 (1995 & Supp. 1997); Or. Rev. Stat. Ann. § 166.250 (1991 & Supp. 1996) ("carries * * * concealed upon the person * * * [or] concealed and readily accessible to the person within any vehicle which is under the person's control or direction"); 18 Pa. Cons. Stat. Ann. § 6106(a) (West 1983 & Supp. 1997) ("carries * * * in any vehicle * * * or * * * concealed on or about his person"); R.I. Gen Laws § 11-47-8 (1994 & Supp. 1997) ("carry * * * in any vehicle or conveyance or on or about his or her person"); S.D. Codified Laws § 22-14-9 (Michie 1988) ("carries * * * on or about his person * * * or * * * concealed in any vehicle operated by him"); Wash. Rev. Code Ann. § 9.41.050 (West 1988 & Supp. 1998) ("carry * * * concealed on his or her person * * * [or] in any vehicle").

[24] See Miss. Code Ann. § 97-37-1 (1994 & Supp. 1997) ("carries, concealed in whole or in part"); Tenn. Code Ann. § 39-17-1307(1) (1997) ("carries with the intent to go armed"); Utah Code Ann. § 76-10-504(1)(b) (1990 & Supp. 1997) ("carries"); Vt. Stat. Ann. tit. 13, § 4003 (1974) ("carries * * * with the intent or avowed purpose of injuring a fellow man"); Wyo. Stat. Ann. § 6-8-104(a) (Michie 1997) ("wears or carries").

[25] See *In the Interest of L.M., J.R., S.T. & D.S.*, 600 So. 2d 967, 970-971 (Miss. 1992) (weapon secured under the hood of a car was "carried" under state concealed weapons provision); Miss. Code. Ann. § 97-37-2 (1994 & Supp. 1997) (recently enacted exclusion to state concealed weapons statute providing that "[i]t shall not be a violation * * * for any person * * * to carry a firearm or deadly weapon concealed in whole or in part * * * within any motor vehicle"); *State* v. *Williams*, 636 P.2d 1092, 1094 (Utah 1981) (stating that "'carrying' necessarily must include more than when the weapon is in physical contact with the body" and that a defendant "will be deemed to be 'carrying' [a] weapon" if it "is shown to be under [the] defendant's control and within his immediate, easy or ready access"); *State* v. *Warr*, 604 S.W. 2d 66, 68 (Tenn. Ct. App. 1980) (pistol under seat held to be carried under state concealed weapons statute).

[26] There appear to be no reported cases of any kind applying the Vermont or Wyoming statutes. *Cf. State* v. *McAdams*, 714 P.2d 1236, 1238 (Wyo. 1986) (rejecting state constitutional challenge to state concealed weapons statute).

court anywhere, to our knowledge—has adopted petitioners' argument that the term "carry," when not limited by a term such as "on the person," does not apply to firearms carried in an automobile.[27]

### D. Nothing In *Bailey* Supports Or Compels The Conclusion That "Carrying" A Firearm In A Vehicle Requires Immediate Accessibility.

Petitioners argue that their proposal to engraft an "on the person" element onto Section 924(c) is supported by this Court's decision in *Bailey*. According to petitioners, "*Bailey* established that 'use' of a firearm under section 924(c)(1) requires a narrow definition—'active employment' of the weapon—not a broad definition, such as merely placing the gun 'at the ready,' as the government had argued." 96-1654 Pet. Br. 15. Petitioners argue that, "in order to preserve the parallel structure of the statute, the term 'carries' in section 924(c)(1) should also be construed narrowly." *Ibid.*

This Court, however, did not construe the term "use" to mean "active use" in *Bailey* because of some overarching principle of narrow construction that is unique to Section 924(c). Indeed, any such principle

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[27] The concealed weapons statutes in six States do not use the word "carry." See Alaska Stat. § 11.61.220(a)(1) (Michie 1996) ("possesses a deadly weapon * * * that is concealed on the person"); Iowa Code Ann. § 724.4 (West 1993) ("goes armed with * * * on or about the person, or * * * carries or transports in a vehicle"); Mass. Ann. Laws ch. 269, § 10(a) (Law. Co-op. 1992) ("knowingly has in his possession; or knowingly has under his control in a vehicle"); N.J. Stat. Ann. § 2C:39-5 (West 1989) ("knowingly has in his possession"); N.Y. Penal Law §§ 265.01-265.03 (West 1989) ("possesses" or "knowingly has in his possession"); Wis. Stat. Ann. § 941.23 (West 1996) ("goes armed with").



would be inconsistent with this Court's decisions in *Smith* and in *Deal* v. *United States*, 508 U.S. 129 (1993), in both of which the Court rejected a narrower construction of a key term in Section 924(c) in favor of a broader one. What *Bailey*, *Smith*, and *Deal* do stand for is the principle that the words Congress used in Section 924(c), like the words it has used in other statutes, should be construed in their ordinary meanings, informed by the statute's history and context. As we have argued above, all of those factors point decisively toward construing the word "carry" as used in Section 924(c) in its ordinary meaning, to include both carrying in a vehicle and carrying on the person.

### E. Because The Ordinary Tools Of Statutory Construction Make The Meaning Of The Term "Carry" In Section 924(c) Clear, The Rule Of Lenity Has No Application In This Case

Petitioners contend (96-1654 Pet. Br. 19-20) that engrafting an "on the person" element to Section 924(c) is "*at least* * * * reasonable," that "the statute is therefore *at least* ambiguous," and that the rule of lenity therefore requires this Court to adopt their construction. See also 96-8837 Pet. Br. 39-42.

"The mere possibility of articulating a narrow construction [for Section 924(c)(1)], however, does not by itself make the rule of lenity applicable." *Smith*, 508 U.S. at 239. Nor is a statute "ambiguous for purposes of lenity merely because there is a division of judicial authority over its proper construction." *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995) (internal quotation marks omitted). As the Court explained in *Moskal* v. *United States*, 498 U.S. 103, 108 (1990), "[b]ecause the meaning of language is inherently contextual, [the Court has] declined to deem a statute

'ambiguous' for purposes of lenity merely because it was *possible* to articulate a construction more narrow than that urged by the government." Instead, the rule of lenity comes into play only when, after "[a]pplying well-established principles of statutory construction," *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 410 (1991), a court "can make no more than a guess as to what Congress intended." *Reno*, 515 U.S. at 65 (internal quotation marks omitted); see also *Smith*, 508 U.S. at 239, quoting *United States* v. *Bass*, 404 U.S. 336, 347 (1971) (the "rule [of lenity] is reserved for cases where, [a]fter seiz[ing] every thing from which aid can be derived, the Court is left with an ambiguous statute") (internal quotation marks omitted); *Chapman* v. *United States*, 500 U.S. 453, 463 (1991) (Lenity applies only where there remains a "grievous ambiguity or uncertainty in the language and structure of the Act.") (internal quotation marks omitted).

This is not such a case. To paraphrase this Court's decision in *Smith*, the "common usage and dictionary definitions of the term[] '[carries] . . . a firearm,'" *Smith*, 508 U.S. at 240, embrace any carrying of a firearm that facilitates a drug trafficking offense, regardless of whether the carrying is done on the person or in a vehicle or some other way. Moreover, Congress's purpose was to impose heightened sanctions when a defendant employs the "dangerous combination" of firearms and narcotics trafficking. *Ibid.* That purpose is inconsistent with an interpretation of the statute that singles out a particular mode of carrying (on the person) while leaving others unpunished.



### F. Under A Proper Interpretation Of Section 924(c), Petitioners Carried Firearms

1. In No. 96-1654, petitioner Muscarello was convicted on his guilty plea to violating Section 924(c). At the plea hearing, the government submitted a factual statement signed by petitioner. The statement recited that petitioner kept a loaded firearm in the locked glove compartment of his truck for protection in relation to his drug dealing offense. Although the district court later discounted Muscarello's agreement to the "in relation to" element of the offense, see 96-1654 Pet. App. 10a-11a, the court of appeals reversed that decision by the district court, 96-1654 Pet. App. 5a. Petitioner did not present any question relating to that holding of the court of appeals in his petition for certiorari. Accordingly, the only remaining issue regarding petitioner's conviction concerns whether the loaded firearm found in the locked glove compartment of his truck can be said to have been carried for purposes of Section 924(c). If this Court agrees with us that an individual carries a gun in a vehicle under Section 924(c) by transporting it there, then the Fifth Circuit's judgment in this case should be affirmed.

Muscarello could obtain outright reversal only if this Court holds that the term "carries" in Section 924(c) requires proof that the firearm was carried on the person of the defendant—a holding adopted by no court of appeals. If, in contrast, this Court holds that a firearm may be carried in a vehicle under Section 924(c), but only if it is immediately accessible, then the case should be remanded to the Fifth Circuit. Because Muscarello's conviction was entered on his guilty plea, there has been no factual development in

this case on how accessible the firearm in the glove compartment was. Ordinarily, a locked glove compartment would provide little barrier to a defendant who wanted ready access to a firearm.[28] Accordingly, the case would have to be remanded to determine whether the firearm was immediately accessible.

2. In No. 96-8837, petitioners admitted that they purchased several guns on the day of a planned drug transaction so that they could steal the cocaine from the sellers. They also admitted that they carried the guns to the trunk of a car and put them in the trunk, before entering the car and driving to the scene of the drug transaction. See 96-8837 J.A. 13, 14-16.[29] Petitioners also pleaded guilty to attempting to possess

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[28] See, *e.g.*, *United States* v. *Holifield*, 956 F.2d 665, 668-669 (7th Cir. 1992) ("it would have taken only a few seconds for [the defendants] to remove the keys from the ignition and unlock" the compartment); *Ensor* v. *State*, 403 So. 2d 349, 354 (Fla. 1981) ("on or about the person" in concealed weapons statute includes "the interior of an automobile and the vehicle's glove compartment, whether or not locked"); *State* v. *Walton*, 429 N.W.2d 133 (Iowa 1988) (revolver in locked glove compartment is readily accessible).

[29] Although Cleveland plainly admitted to carrying the firearms in a bag to the car, Gray-Santana appears to have directly admitted only that, earlier on the day of the planned drug transaction, he purchased one of the guns that were ultimately found in the car in order to facilitate the planned theft of the drugs. See 96-8837 J.A. 26, 27. Of course it could be readily inferred that, after purchasing the gun, he carried it at least to the point where he could give it to Cleveland to put in the car. Nonetheless, even if Gray-Santana did not himself physically carry the gun on his person at any time, he would be guilty of violating Section 924(c) as an aider and abettor of Cleveland. See 18 U.S.C. 2.



cocaine with intent to distribute it, in violation of 21 U.S.C. 846. 96-8837 J.A. 16, 28.

Under any possible construction of the word "carry" in Section 924(c), petitioners' admissions regarding the purchase and carrying of the guns to the automobile—even aside from their carrying of the guns in the automobile—are sufficient to constitute an admission that they carried the firearms during and in relation to the drug trafficking offense for which they were convicted. Petitioners' convictions therefore should be affirmed.

We acknowledge that we did not argue in our opposition to the petition for certiorari in No. 96-8837 that the Section 924(c) convictions of petitioners Cleveland and Gray-Santana would have to be affirmed regardless of this Court's ruling in their case. See Sup. Ct. R. 15.2. Nonetheless, upon a closer examination of the record, it has become apparent that petitioners' convictions could not be reversed under any interpretation of Section 924(c) presented by the parties in these cases. Accordingly, this Court may wish to dismiss the writ of certiorari in No. 96-8837 as improvidently granted.[30]

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[30] With respect to petitioner Cleveland, this case arises from his motion under 28 U.S.C. 2255 in district court. See p.8 & note 1, *supra*. With respect to petitioner Gray-Santana, it has never been finally determined whether this case has proceeded under Section 2255 or instead whether it should be viewed as having arisen from a motion to withdraw a guilty plea under Rule 32(e) or as a motion to correct sentence under Federal Rule of Criminal Procedure 35(c). See note 1, *supra*. Because it rejected petitioners' claims on their merits, the court of appeals "d[id] not address any potential jurisdictional question stemming from Cleveland's § 2255 appeal." 96-8837 J.A. 104. Insofar as No. 96-8837 arises from the Section 2255 motions of

## CONCLUSION

The judgments of the courts of appeals should be affirmed.

Respectfully submitted.

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one or both petitioners, the appropriate disposition of the case may be affected by this Court's decision in *Bousley* v. *United States*, No. 96-8516. That case involves questions that arise in an analogous setting under Section 2255 regarding whether a decision that would narrow the substantive scope of a federal criminal statute has retroactive application in a case brought under Section 2255, whether a guilty plea bars a defendant's claim that the acts he committed are not a federal crime, and whether a defendant may make such a claim notwithstanding the failure to raise it on direct appeal.

## APPENDIX

Section 924(c) of Title 18 of the United States Code provides in relevant part:

(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

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FRANK J. MUSCARELLO,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

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**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

In his opening brief ("M. Br."), petitioner Frank J. Muscarello demonstrated: (1) that the ordinary or natural meaning of the phrase "carries a firearm" (18 U.S.C. § 924(c)(1)) is "bears a firearm on one's person" (M. Br. 8-20); (2) that, at its broadest, "carries a firearm" should be limited to "possesses a firearm in an immediately accessible location" (M. Br. 20-22); and (3) that both the court of appeals' construction ("knowingly possesses a firearm in a vehicle") and the government's construction ("transports a firearm") are contrary to ordinary rules of statutory construction as well as the rule of lenity. (M. Br. 23-25)

In response, the government's brief ("U.S. Br.") offers arguments that are wholly unpersuasive: It divorces the meaning of "carry" from its context in section 924(c)(1); violates cardinal rules of statutory construction; contradicts the government's own prior assertions to this Court regarding the legislative history of section 924(c)(1); and erroneously contends that "carrying a firearm" means "transporting a firearm." Accordingly, petitioner's construction of section 924(c)(1) should be adopted, and the judgment below should be reversed.

### ARGUMENT

### I. "CARRIES A FIREARM" MEANS "BEARS A FIREARM ON ONE'S PERSON"

#### 1. The Plain Language Of Section 924(c)(1), In Context, Makes Clear That "Carries A Firearm" Means "Bears A Firearm On One's Person"

**a.** ***The Importance Of Context*** **—** Petitioner showed in his opening brief (at 8-20) that the term "carries a firearm" means "bears a firearm on one's person." The government agrees that "carry[ing] a firearm" *includes* bearing a firearm on one's person, but urges that it is not *limited* to that situation. (U.S. Br. 14)

In making this argument, the government places controlling reliance upon "the first definition of the term 'carry'" (U.S. Br. 12, 13; *see also* U.S. Br. 14 n.4) out of two particular dictionaries. But while "first definition[s]" may be useful for ascertaining general definitions of isolated words (as for a high-

school vocabulary test), they say little about what a word means *in context*. (*See* M. Br. 9)[1] "[T]he meaning of statutory language, plain or not, *depends on context*." *Bailey v. United States*, 516 U.S. 137, 145 (1995) (emphasis added; citations and internal quotations omitted). This is a "fundamental principle of statutory construction (and, indeed, of language itself)." *Deal v. United States*, 508 U.S. 129, 132 (1993). Thus, *when a dictionary offers multiple meanings for a word, "all but one of the meanings is ordinarily eliminated by context."* *Id.* at 131-32 (emphasis added).[2]

Obviously, a "first definition" will not necessarily be the *contextual* meaning that should be ascribed to that word.[3] Thus,

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[1] The "first definition" in any given dictionary may represent "the most frequently encountered meaning" of a word (*The Random House Dictionary of the English Language* xxix (1966)), "[t]he earliest meaning ascertainable . . ., whether it is literary, technical, historical, or obsolete" (*Webster's New International Dictionary of the English Language* xv (2d ed. 1950)), or only the "historical" first meaning. *Webster's Third New International Dictionary of the English Language* 17a (1986). This latter dictionary also notes that the numbering of the different senses of a word "does not evaluate senses or establish an enduring hierarchy among them." *Id.*

[2] *See also Ardestani v. INS*, 502 U.S. 129, 135 (1991) ("The word 'under' has many dictionary definitions and must draw its meaning from its context."); *Northern Pacific Ry. v. Soderberg*, 188 U.S. 526, 530 (1903) ("The word 'mineral' is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case.").

[3] For example, in one of the government's two preferred dictionaries, "the most frequently encountered meaning" of the word "bay" is "a body of water forming an indentation of the shoreline, larger than a cove but smaller than a gulf." *The Random House Dictionary of the English Language* at 128. This "first definition" does not aid the reader in understanding that the author of the sentence "I put the saddle on the bay" meant to describe preparing a horse for riding. *See* A. Scalia, *A Matter of Interpretation: Federal Courts and the Law* 26 (1997).



the government's dictionaries note that "secondary meanings," "technical senses" (*Webster's New International Dictionary of the English Language* xvi (2d ed. 1950)), or "specialized senses" are provided in the other listed definitions, *The Random House Dictionary of the English Language* xxix (1966), and that *"[t]he best sense is the one that most aptly fits the context of an actual genuine utterance."* *Webster's Third New International Dictionary of the English Language* 17a (1986) (emphasis added). That is exactly why dictionaries provide both definitions for senses that are context-specific, as well as examples of how these senses are used in their proper context.

When the context — carrying *firearms* — is considered, as petitioner has shown (M. Br. 9-10), major dictionaries "show a remarkable unanimity" (*cf.* U.S. Br. 12) in limiting the definition of "carry arms or weapons" to mean "[t]o wear, bear, or carry them upon the person or in the clothing or in a pocket." *Black's Law Dictionary* 194 (5th ed. 1979). Indeed, even the government's principal preferred dictionary, *Webster's New International Dictionary of the English Language*, likewise offers, as its first definition of the contextual phrase "carry arms," "[t]o bear weapons." *Id.* at 412.

In addition to including definitions for particular contexts, dictionaries also often provide examples of word usage. "These illustrations . . . show how a word is used *in actual contexts*." *Webster's II New Riverside Dictionary* 20 (1984) (emphasis added). *See also Webster's Third New International Dictionary* at 17a (an example "illustrates an appropriate use of the word *in context*") (emphasis added). Thus, the correct contextual understanding of "carries a firearm" — "bears on the person" — is confirmed by the illustration found in one leading dictionary's secondary definition of "carry": "To have or keep on one's person (carry a gun)." *Webster's II New Riverside Dictionary* at 232-33. *See also* II *The Oxford English Dictionary* 921 (2d ed. 1989) (similar). Significantly, no dictionary (to petitioner's knowledge) uses "carry a gun" or any similar construct to illustrate the broad sense of "carry" urged by the government.

Since "firearms" are typically borne on the person, it is not surprising that contextual terms such as "carry arms" or "carries a firearm" are ordinarily understood to mean "bears on one's person." Thus, without further modification (such as "he carries the firearm *in his automobile*"), one would understand the "carrying" of such personal adjuncts as firearms (as well as briefcases, suitcases, and umbrellas — all of which, like guns, contain handles for personal "carrying") to mean "borne on the person" only. But when the object is something *not* ordinarily borne on the person, but more ordinarily moved in a vehicle — *e.g.*, carrying "a spare tire" (*cf.* U.S. Br. 21), a jack, jumper cables, or four tons of road salt — the context confirms that such phrases mean "transported in a vehicle," not "borne on the person."

**b.** ***The Erroneousness Of The Government's Position*** — The government's erroneous understanding of section 924(c)(1) is confirmed by its inability to propose a coherent definition of "carries a firearm" that would cover *both* a gun in a vehicle (regardless of accessibility) *and* a gun borne on the person.

In opposing certiorari, the government asserted that "to carry an object means to transport it." (Br. in Opp. to Certiorari 6) Unable to rebut petitioner's showing that "carry" *cannot* mean "transport" in view of Congress's repeated use of "transport" in the firearms laws to define different violations (M. Br. 13-14), *see Russello v. United States*, 464 U.S. 16, 23 (1983); *Bailey v. United States*, 516 U.S. at 143, the government now claims to have retreated from its earlier position. While admitting that "'carry' and 'transport' are closely related," the government denies in its merits brief that it is urging "a meaning for the term 'carry' that is interchangeable with . . . 'transport,'" because there are supposedly subtle "connotati[ve]" differences between the two words. (U.S. Br. 21-22)

This denial is unconvincing, for in other portions of its brief the government admits that it is *still* urging that "carry" means "transport." (U.S. Br. 14, 18 n.7, 43) Indeed, when the government seeks to apply its "standard" for carrying, it asks this Court specifically to hold "that an individual carries a gun in a



vehicle under Section 924(c) *by transporting it there.*" (U.S. Br. 43, emphasis added) Moreover, the government's claim that the focus of the word "transport" it *not* on vehicles (U.S. Br. 22-23) is erroneous. In fact, the government has frequently prosecuted defendants for "transporting" a firearm in a vehicle. *See, e.g., United States v. Albarran*, No. 86-5183, 1987 WL 38620 at *1 (4th Cir. Sept. 24, 1987) (prosecution for drug trafficking, and for transporting a firearm in glove compartment of a car under section 924(b)); *United States v. Hernandez*, 662 F.2d 289, 290-91 (5th Cir. 1981) (prosecution for transporting guns under hood of car and in glove compartment).

Similarly, to avoid the problems created by the Fifth Circuit's construction — under which "carrying a firearm" impermissibly "takes on a different meaning" in vehicle cases (Pet. App. 6a, quoting *United States v. Pineda-Ortuno*, 952 F.2d 98, 104 (5th Cir.), *cert. denied*, 504 U.S. 928 (1992); *see* M. Br. 24) — the government appears to suggest that "movement" would also be a prerequisite to a charge of "carrying a firearm" in a non-vehicle case. (U.S. Br. 12, 23) But requiring "movement" as an element of the crime of "carrying a firearm" would be inconsistent with the dictionary definitions of such contextual terms as "carry arms," which require the arms to be physically located on the subject, but place no emphasis whatsoever upon "movement." *See also Black's Law Dictionary* 194 (5th ed.) ("locomotion not being essential" to "carry"). The government's "movement" construction thus would exclude any defendant who was personally armed with a gun during a drug crime, but not proved to be "'moving from place to place'" with it. (U.S. Br. 14, quoting *Webster's New International Dictionary of the English Language* at 412) This would be a bizarre result, since such a non-moving defendant, who could fire a gun and kill in a split second, would present far more of "the 'grave possibility of violence and death'" (U.S. Br. 27, quoting *Smith v. United States*, 508 U.S. 223, 240 (1993)) than petitioner, whose gun was admittedly locked away in a glove compartment at all relevant points in the course of the drug-trafficking crime.

Requiring "movement" as a *sine qua non* of "carrying a firearm" would also result in different treatment of similarly situated defendants. Under the government's proposal, a defendant with a gun in a truck's locked glove compartment would be illegally "carrying" that gun, but a defendant transacting a drug deal while seated at his kitchen table with a gun in a cookie jar (unlocked) on that table would not. Similarly, a defendant seated in the driver's seat of an automobile, with a gun between the seats, would be "carrying" that gun, but a defendant transacting a drug deal while seated on his living-room sofa, with a gun between the cushions, would not. These latter examples of non-vehicular defendants would present *at least* the same "grave possibility of violence and death" as the ones with guns in vehicles, but their conduct — unlike that of their similarly situated counterparts in vehicles — would go wholly unpunished under the government's construction of section 924(c)(1).

Thus, it is hardly surprising, as petitioner showed (M. Br. 11-12), that this Court and its individual members have previously referred to the contextual phrase "carries a firearm" in ordinary and natural ways that would neither require, nor even suggest, a "movement" element. (*See* M. Br. 11-12, quoting *Bailey v. United States*, 516 U.S. at 146 (equating carrying with "handling" and "keep[ing] a gun hidden in [one's] clothing"); *Smith v. United States*, 508 U.S. at 236 ("keeping it on his person"); *id.* at 245-46 (Scalia, J., dissenting) ("carrying it in such a manner as to be ready for use as a weapon"); *United States v. McFadden*, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting)). The government offers no response to this showing, nor could it.[4]

[4] Nor does the government respond to Judge Kozinski's recognition, for the *en banc* Ninth Circuit in *United States v. Foster*, that the statement "Don Corleone is carrying a gun" is ordinarily understood to mean that "the Don has a sidearm *somewhere on his person.*" 133 F.3d 704, 705 (9th Cir. 1998) (*en banc*) (emphasis added).



Indeed, in view of "carry"'s companion in section 924(c)(1) — "use" — it would be incredible to conclude that Congress meant "carry" to mean "movement" of a firearm. As petitioner showed (M. Br. 15), this Court in *Bailey v. United States*, 516 U.S. at 150, announced a narrowly circumscribed definition of "using" a firearm — "actively employ[ing]" it. This says much about what Congress meant to criminalize by imposing heavy sentences upon one who "uses or carries a firearm." It is doubtful that Congress would have penalized "active employment" — which would include such dangerous activities as firing into a crowd — on parity with merely transporting a gun in a location such as a locked compartment, where it could not be easily and quickly "used." Contrary to the government's argument, it is not "some overarching principle of narrow construction that is unique to Section 924(c)" (U.S. Br. 40) that leads to this conclusion; rather, it is the well-established rule that a word is known by the company it keeps (*noscitur a sociis*). *E.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).[5]

Finally, the government seeks to make much out of the fact that no court of appeals has yet interpreted "carr[ying] a firearm" as meaning "bearing a firearm on one's person." (U.S. Br. 18, 39-40) But this Court does not construe statutes by tallying the

[5] The government also misunderstands petitioner's point (M. Br. 16) about the lesser penalties imposed by statute for "transporting," "possessing," or "shipping" firearms, as well as under the United States Sentencing Guidelines for merely "possess[ing]" a firearm. *See* U.S.S.G. § 2D1.1(b)(1) (1997). It is not that these penalties were specifically considered by Congress in 1968, or even in 1984 when the statute was amended to include the present "uses or carries a firearm" language. (U.S. Br. 31 n.17) The point is that the wide disparity between the penalties (*e.g.*, between the guideline enhancement (four months) and the statutory mandatory minimum (five years)) illuminates the serious nature and consequent narrow meaning of "carrying" a firearm. *See United States v. McFadden*, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting).

votes of lower courts. To the contrary, this Court not infrequently reaches results that are contrary to all or most of the courts of appeals. For instance, in *Bailey v. United States, supra*, the government recognized in its brief on the merits (at 16 n.4) that no court of appeals had previously adopted an "active employment" construction of "uses . . . a firearm" in section 924(c)(1) — yet this Court adopted just such a construction of that phrase. 516 U.S. at 144. *See also, e.g., McNally v. United States*, 483 U.S. 350, 364 (1987) (Stevens, J., dissenting) (recognizing that all of the federal courts of appeals to have construed the mail-fraud statute had previously read the statute in the fashion rejected by the majority).

c. ***The Irrelevance Of Cases Cited in Black's*** — The government discusses at great length the cases cited in the various earlier editions of *Black's Law Dictionary* for the entry "carry arms or weapons." (U.S. Br. 16-18 & nn. 5-7) Based on its analysis of these cases — particularly *State v. Murray*, 39 Mo. App. 127 (1890), and *State v. Carter*, 36 Tex. 89 (1871) — the government concludes that *Black's* "provides no support whatever for petitioners' claim that 'carry,' as used in Section 924(c) without the qualifying phrase 'on the person,' is nonetheless limited to carrying on the person." (U.S. Br. 17)

Petitioner is at a loss to understand the government's argument: *The definition itself* provides just that sort of "support" — it defines "carry arms or weapons" to mean "[t]o wear, bear, or carry them upon the person or in the clothing or in a pocket." *Black's Law Dictionary* 194 (5th ed.). Indeed, this Court often looks to *Black's* for definitions of words or phrases in statutes, and it virtually always relies upon the definition itself, not the cases cited there.[6] Were the practice otherwise, as the

[6] *See, e.g., Kawaauhau v. Geiger*, No. 97-115, 1998 WL 85302, *3 n.3 (U.S. March 3, 1998) ("willful"); *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 117 S. Ct. 796, 801 (1997) ("entitle"); *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) ("cognizable"); *Molzof v. United States*, 502 U.S. 301, 307 (1992) ("punitive damages"); *United States v. Turley*, 352 U.S. 407, 412 (1957) ("steal").



government suggests, the definitions themselves would be largely worthless. And petitioner knows of no case, from this Court or any other, that has parsed the language of cases cited in *Black's Law Dictionary* and concluded that the *Black's* definition was wrong. Yet that is just what the government urges here.

In fact, to interpret the phrase "uses . . . a firearm" in section 924(c)(1), this Court relied upon the current (sixth) edition of *Black's Law Dictionary* in both *Bailey v. United States*, 516 U.S. at 145, and *Smith v. United States*, 508 U.S. at 228-29. Significantly, even though the sixth edition *does* cite cases under its "use" entry (*see Black's Law Dictionary* 1541 (6th ed. 1990)), in neither *Bailey* nor *Smith* did the Court see fit to analyze the cited cases in order to expound upon (let alone *contradict*) the dictionary definition of "use."

In all events, the two cases cited in the older editions of *Black's* do not aid the government at all. The government suggests that because the statutes at issue in these cases both modified their prohibitions upon "carrying" weapons with "on the person" or similar language,[7] "the legislatures that enacted those statutes showed the common understanding that the term 'carry,' as used in Section 924(c) without that qualification, would have a broader meaning." (U.S. Br. 17) What the government fails to recognize is that those statutes also criminalized carrying weapons concealed "about" one's person — a qualification that is generally understood to impose an "immediate accessibility" requirement, not an "on the person" standard. (*See* U.S. Br. 37 n.22) *See also Black's Law Dictionary* 982 (5th ed.) ("about," in statutes making it an offense to carry a weapon "on or about" the

[7] For example, the Missouri statute criminalized "carry[ing] concealed upon *or about* [one's] person any deadly or dangerous weapon." Mo. Rev. Stat. § 3502 (1889) (emphasis added). The Texas statute, similarly, criminalized "carry[ing] on *or about* [one's] person, saddle, or in [one's] saddle bags, any pistol." 1879 Tex. Crim. Stat. tit. IX, art. 318 (Penal Code) (emphasis added).

person, "convey[s] the idea of being nearby, in close proximity, within immediate reach, or conveniently accessible"). Thus, it is hardly surprising that these state legislatures, to avoid the awkward phrasing of "carry about the person," used the more common "on or about the person" language.

**d.** ***The Irrelevance Of Federal Authorization Statutes*** — The government also urges that its construction of section 924(c)(1) is supported by federal "authorization statutes" that allow certain federal officials "to carry firearms." (U.S. Br. 31-34 & n.18) The government's theory is that, if section 924(c)(1)'s prohibition upon "carr[ying] a firearm" is construed to mean bearing a firearm on one's person, then the various "authorization statutes" will also have to be so limited, such that federal officials could carry a gun in a holster, but not "remove such guns upon entering a car and lay them on the seat, place them in a locked glove compartment, or put them in the trunk." (U.S. Br. 33)

The government's argument is seriously mistaken. The authorization statutes cited by the government are totally unrelated to the legislation that contained section 924(c)(1). Indeed, those statutes are so fundamentally different from section 924(c)(1), both in their language and in their approach, that they lend no assistance in understanding the meaning of section 924(c)(1)'s prohibition upon "carr[ying] a firearm." As one leading treatise warns, "[t]he interpretation of one statute by reference to an analogous but unrelated statute is considered *an unreliable means of discerning legislative intent.*" 2B N. Singer, *Sutherland Statutory Construction* § 53.05, at 238 (5th ed. 1992) (emphasis added). Even the government's own authorities, *Reno v. Koray*, 515 U.S. 50, 56-57 (1995), and *Gozlon-Peretz v. United States*, 498 U.S. 395, 407-08 (1991) (*see* U.S. Br. 31), bear out this principle. These cases, and many others decided by this Court, establish only that "other, *related* legislative enactments" may be useful, and then only for "interpreting *specialized* statutory terms." *Id.* at 408 (emphasis added). *See also Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *Northcross v. Board of Education of the Memphis City Schools*, 412 U.S. 427, 428 (1973) (per curiam).



For several reasons, the principle relied upon by the government is wholly inapposite here. *First*, none of the authorization statutes is "related" to the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, which enacted present-day section 924(c)(1). *Compare Reno v. Koray*, 515 U.S. at 56 (interpreting provision of Sentencing Reform Act of 1984 with reference to a similar provision in the Bail Reform Act of 1984, which were "enacted in the same statute"). Nor do the authorization statutes "share a common purpose" with section 924(c)(1), *Oscar Mayer & Co. v. Evans*, 441 U.S. at 756; indeed, the purpose of section 924(c)(1) (*prohibiting* the carrying of a firearm by individuals engaged in a crime of violence or drug trafficking) is entirely different than that of the authorization statutes (*permitting* the carrying of a firearm by certain federal officials).

*Second*, "carries a firearm" is not the sort of "specialized statutory ter[m]" that would merit application of the principle relied upon by the government. Unlike in *Gozlon-Peretz*, where the term at issue was "supervised release," 498 U.S. at 407, and in *Reno v. Koray*, where the disputed term was "official detention," 515 U.S. at 56, the term here is an ordinary one — "carries a firearm" — and even the government concedes that this is not a "specialized statutory ter[m]," but one that "must be construed 'in accord with its ordinary or natural meaning.'" (U.S. Br. 12, quoting *Smith v. United States*, 508 U.S. at 228)

*Third*, and in any event, contrary to the government's argument (U.S. Br. 33), the authorization statutes can function with no "inexplicable gaps" if the phrase "carries a firearm" is interpreted to mean "bears on the person." Because such statutes are interpreted broadly, in order to achieve their obvious and intended purposes it is appropriate to apply the salutary principle that the greater power includes the lesser. *See, e.g., United States v. O'Neil*, 11 F.3d 292, 296 (1st Cir. 1993) ("The principle that the grant of a greater power includes the grant of a lesser power is a bit of common sense that has been recognized in virtually every legal code since time immemorial."). Thus, if a federal official is allowed to have a firearm on his person, he is

necessarily allowed to put it on his seat or elsewhere in the car when he drives. To illustrate the point, one authorization statute cited by the government also gives United States Marshals the authority only to "make arrests without warrant" (18 U.S.C. § 3053). The Second Circuit has held that U.S. Marshals also possess the power to make *Terry* stops, even though such stops are not "arrests" within the common meaning of that word, because "the power to take reasonable law enforcement steps short of, but which may well lead to an arrest can be fairly implied from the grant of powers of arrest." *United States v. Riggs*, 474 F.2d 699, 702 n.2 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973). The Second Circuit further noted that "[t]here would be no merit" in a contrary contention. *Id.*

**e.** ***The Irrelevance Of State Concealed Weapons Statutes*** — The government's argument with respect to *Black's Law Dictionary* (*see* p. 8, *supra*) foreshadows its similar contention (U.S. Br. 34-40) that, because many state concealed weapons laws modify their "carrying" prohibitions "by expressly using a phrase such as 'on or about the person' or the like" (U.S. Br. 35), the unmodified term "carries a firearm" must admit of a broad construction. But there is no evidence that Congress looked at any of these state laws in drafting present section 924(c)(1), and there is too much of a "wide variety of state statutes on th[is] subject" (U.S. Br. 34), not to mention state-court decisions interpreting those statutes, for any meaningful conclusions to be drawn from them. Nor does the government cite a single case that ascribes any significance to such state laws in construing section 924(c)(1). More fundamentally, however, the government's analysis leads nowhere.

*First*, the government discusses state statutes that "prohibit carrying a firearm . . . by expressly using a phrase such as 'on or about the person' or the like." (U.S. Br. 34-37 & nn. 21-22) As noted above, however, statutes that criminalize carrying a firearm "on or about" the person capture not only those defendants who personally bear a firearm ("on"), but also those who bear a firearm in an area not "on," but immediately accessible to the defendant ("about"). *See, e.g., State v. McNary,*



596 P.2d 417, 420 (Idaho 1979) (cited in U.S. Br. 37 n.22); *Black's Law Dictionary* 982 (5th ed.). Thus, as with the statutes cited in the cases from the older editions of *Black's Law Dictionary*, most of these legislatures properly included both "on" and "about" in order to confirm, with clarity, that the statutes penalized both personal carrying *and* possession of guns in an immediately accessible area.

*Second*, the government cites state statutes that criminalize both carrying "on or about" one's person *and* in a vehicle. Far from advancing the government's argument, however, those statutes only undermine it. Under the government's view that "carry" includes *both* firearms borne on the person *and* firearms transported in a vehicle, the addition of "in a vehicle" (or for that matter, of any modifying language) would seem to be unnecessary surplusage. (*Cf.* U.S. Br. 35-37)

*Finally*, the government cites a handful (five) of state laws that prohibit the "carrying" of concealed weapons without any qualification (and in particular the state cases interpreting three of those statutes). Those statutes and cases *at most* support petitioner's alternative proposal that "carried" means "immediately accessible." They do *not* support the government's attempt to equate "carries a firearm" with "transports a firearm."

The Mississippi statute, which proscribes "carr[ying], concealed in whole or in part," Miss. Code Ann. § 97-37-1 (1994), has been interpreted by that state's highest court for almost 70 years to require that the weapon be "'*readily accessible and available for use.*'" *L.M., JR., S.T. & D.S. In the Interest of*, 600 So. 2d 967, 970 (Miss. 1992) (cited in U.S. Br. 39; emphasis in original), quoting *Clark v. City of Jackson*, 124 So. 807, 808 (Miss. 1929).[8] The Utah statute, prohibiting "carrying

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[8] Having articulated the *Clark* standard in Part I of its opinion, the Mississippi Supreme Court in Part III inexplicably affirmed one defendant's conviction, for having a gun under the hood of his car, because he "knew of the existence and was in constructive possession or control of the weapon in the vehicle." *L.M., JR., S.T. & D.S. In the*

a concealed dangerous weapon," Utah Code Ann. § 76-10-504(1)(b) (Supp. 1997), has also been construed to impose an "immediately and easily accessible" requirement. *State v. Williams*, 636 P.2d 1092, 1095 (Utah 1981). Even so, the Utah Supreme Court was able to broaden the meaning of "carry" a weapon (beyond "on the person" to "immediately accessible") only because of a liberal Utah rule of statutory construction that flatly conflicts with this Court's rule of lenity jurisprudence. *Id.* Finally, the Tennessee statute, which prohibits "carr[ying a weapon] with the intent to go armed," Tenn. Code Ann. § 39-4921 (Supp. 1981) (now Tenn. Code Ann. § 39-17-1307(1) (1997)), has been interpreted only by that state's *intermediate* criminal court of appeals, which equated "carrying" with "possession of the pistol" — a position even the government disavows. (U.S. Br. 21, "under both petitioners' view and ours, proof of possession alone does not amount to proof of carrying"). *See State v. Warr*, 604 S.W.2d 66, 68 (Tenn. Crim. App. 1980).

In short, the government gains nothing from its laborious analysis of these state firearm statues. The government succeeds only in demonstrating the utter lack of merit in its own attempt to equate "carries a firearm" with "transports a firearm."

**2. The Government's Legislative-History Argument Is Misguided And Squarely Contradicts Arguments That It Made To This Court In *Bailey v. United States***

Petitioner showed (M. Br. 17-19) that the "sparse" legislative history behind section 924(c)(1), *see Simpson v. United States*, 435 U.S. 6, 15 (1978), as originally enacted, supports his preferred construction, because every relevant reference to "carrying a firearm" uses the term to mean "borne on the person." The government, in response, repeatedly trumpets a single statement, made by the amendment's sponsor and "echoed

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*Interest of*, 600 So. 2d 967, 971 (Miss. 1992). Three justices dissented, noting that "Part III of the majority opinion and its disposition . . . is wholly at odds with Part I and the law." *Id.* at 972 (Banks, J., dissenting).



by others" in the House during the brief floor debates over that amendment, that "[t]he effect of a minimum mandatory sentence in this case is to persuade the man who is tempted to commit a Federal felony to leave his gun at home." 114 Cong. Rec. 22,231 (1968) (statement of Rep. Poff), quoted in U.S. Br. 25, 26, 30. According to the government, Poff's comments are both inconsistent with petitioner's proposed construction and entitled to significant weight in determining the meaning of "carries a firearm." (U.S. Br. 25-27)

The government's position with respect to what can be drawn from Representative Poff's floor comments is a complete about-face from its recent representations to this Court. Only two Terms ago, in *Bailey v. United States*, the Solicitor General told this Court, in describing the very same passage, that "Representative Poff was referring to the 'uses' prong of the original Section 924(c)," and was *"not referring to the 'carries' prong of the original Section 924(c)."* Brief for the United States at 28, *Bailey v. United States*, 516 U.S. 137 (1995) (Nos. 94-7448 and 94-7492) (emphasis added). Having made that representation in an unsuccessful effort to obtain a broad construction of section 924(c)(1)'s "uses . . . a firearm" component, the government cannot be taken seriously when it relies upon that very same legislative history to seek a broad construction of the statute's "carries a firearm" component.

In any event, Poff's statement provides no guidance in construing the "carries a firearm" component of the statute. As the government itself noted, when section 924(c)(1) was originally enacted, it proscribed only the *unlawful* carrying of a firearm; thus, the "carries a firearm unlawfully" proviso "would have had no force in 'persuading' such an individual [licensed lawfully to carry a firearm] 'to leave his gun at home.'" *Id.* This same reasoning also renders irrelevant virtually all of the other floor comments cited by the government which "echoed" Representative Poff's comment. *See* U.S. Br. 25, 26 (citing 114

Cong. Rec. 22,243-22,244 (Rep. Hunt); *id.* at 22,244 (Rep. Randall); *id.* at 22,236 (Rep. Meskill)).[9]

If Congress had wished to pass a statute to ensure that every drug-trafficking defendant would "leave his gun at home," it had ample ability to do so by criminalizing the *possession* of a firearm, not the "use" and "carrying" of a firearm. Congress can do so now if it wishes.[10]

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[9] The government also urges (U.S. Br. 25-26) that a floor statement of Representative May supports its reading of the statute. The quoted language was from a resolution passed at the 1968 Annual Conference of the Washington Association of Sheriffs and Police Chiefs, which "urg[ed] and recommend[ed] that carrying short firearms in motor vehicles be classified as carrying such weapons concealed." 114 Cong. Rec. 22,242. Both the language of the resolution, and Representative May's reliance upon it, refer solely to *state* laws involving "carrying such weapons concealed," which have traditionally been within the purview of the states. (U.S. Br. 31, 34-40) And Representative May cited that resolution simply to make a "point" that she thought was "effectively spelled out" by the resolution: "[I]t is unlikely that there can be truly effective regulation of the use and ownership of firearms *if the States and local communities* do not work to enact and enforce meaningful laws and ordinances." 114 Cong. Rec. 22,242 (emphasis added). Thus, this passage sheds no light whatsoever on the meaning of "carries a firearm" in section 924(c)(1).

[10] In his opening brief (M. Br. 14 n.5), petitioner noted the current congressional efforts to amend section 924(c)(1), including the Senate's passage of S. 191. The bill then pending in the House, H.R. 424, 105th Cong. (1998), has now been passed by that body. *See* 144 Cong. Rec. H 535-36 (daily ed. Feb. 24, 1998). The House legislation has been transmitted to the Senate, where it has been referred to the Senate Committee on the Judiciary. Likewise, S. 191, 105th Cong. (1998) has been transmitted to the House, where it was referred to the House Committee on the Judiciary.



### 3. The Rule Of Lenity Confirms The "Bears On The Person" Construction

Petitioner showed (M. Br. 19-20) that, even if the plain language of section 924(c)(1) did not compel the "bears on the person" interpretation of "carries a firearm," this construction is at least reasonable, and thus should be adopted under the rule of lenity. The government responds by urging (U.S. Br. 41-42) that the rule of lenity should not apply because there is no ambiguity in the language or structure of the act.

As petitioner has shown, the meaning of the statute is indeed clear — but not in the way the government suggests. But even if the government's "transporting a firearm" construction were "reasonable" — which it is not — it is obviously not the *only* "unambiguously correct" one. *United States v. Granderson*, 511 U.S. 39, 54 (1994). Faced with such a choice between interpretations, petitioner's narrower construction should prevail under the rule of lenity.

### 4. Under The "Bears On The Person" Construction, Petitioner's Conviction Must Be Reversed

The government concedes that petitioner did not "carry a firearm" under petitioner's "bears a firearm on one's person" construction by transporting it in a locked glove compartment. If, as petitioner maintains, that construction is correct, then the government concedes that he is entitled to "outright reversal." (U.S. Br. 43)

## II. AT ITS BROADEST, "CARRIES A FIREARM" SHOULD BE LIMITED TO "BEARS IN A LOCATION IMMEDIATELY ACCESSIBLE TO THE DEFENDANT"

1. As petitioner noted in his opening brief (M. Br. 21), construing "carries a firearm" to mean "possesses in a vehicle in a manner immediately accessible to the defendant," which petitioner has proposed as an alternative construction of section 924(c)(1), would be somewhat less faithful to the language and context of that statute than the "bears on the person" construction

discussed in Section I, *supra*. Nonetheless, three federal courts of appeals have interpreted the statute in that fashion,[11] and — as the government itself notes — several state statutes that prohibit the simple "carrying" of concealed firearms have been interpreted similarly by state courts of last resort. *See L.M., JR., S.T. & D.S. In the Interest of*, 600 So. 2d at 970; *State v. Williams*, 636 P.2d at 1094. This interpretation has far more validity than the all-encompassing "anywhere in the car" standard urged by the government.

2. Petitioner showed in his opening brief (M. Br. 22) that construing "carries a firearm" in this alternative fashion would also be consistent with the rule of lenity. As noted, the government views its construction as the only reasonable one, and thereby suggests that the "immediately accessible" construction is not a reasonable alternative. (U.S. Br. 20-21) This is difficult to square with the government's other arguments. Indeed, the government has favorably relied upon decisions from two state courts (*L.M., JR., S.T. & D.S. In the Interest of, supra; State v. Williams, supra*) that have held the unmodified word "carries" in their firearms statutes to mean, respectively, "readily accessible and available for use" and "immediately and easily accessible." (U.S. Br. 39) Unless the government is relying upon "unreasonable" state-court interpretations to support its own views, a similar construction of the "carries a firearm" component of section 924(c)(1) would have to be preferred over the government's sweeping interpretation — even if the latter could possibly be said to be reasonable.

3. Petitioner showed (M. Br. 22) that even under the alternative "immediately accessible" construction of "carries a firearm," his conviction would have to be reversed outright, because the firearm was located in a locked glove compartment — which could not satisfy any reasonable understanding of

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[11] *See United States v. Foster*, 133 F.3d at 708; *United States v. Riascos-Suarez*, 73 F.3d 616, 623 (6th Cir.), *cert. denied*, 117 S. Ct. 136 (1996); *United States v. Cruz-Rojas*, 101 F.3d 283, 286 (2d Cir. 1996).



"readily accessible." The government concedes that, at the very least, a remand for further factual findings would be in order under such a test. (U.S. Br. 43-44)

In fact, reversal *without* remand would be appropriate. It is well established — as a recognized treatise on automobile law states — that a firearm in a locked glove compartment is not "immediately accessible" under the general understanding of that construct. 8A Blashfield, *Cyclopedia of Automobile Law and Practice* § 5528.90, at 119 (perm. ed.).[12] The cited section of Blashfield explains that, while a weapon carried in an *unlocked* glove compartment is often held to be carried "about" the person (which Blashfield defines as "within reach, or readily accessible, and available for use," *see id.* § 5528.88, at 110) (footnotes omitted), *"a contrary result" obtains "if the compartment is locked." Id.* § 5528.90, at 119 (emphasis added), citing *Turley v. Commonwealth*, 209 S.W.2d 843 (Ky. 1948). Blashfield cites no contrary authority involving *locked* glove compartments, and the government's authorities are also not to the contrary.[13]

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[12] Ironically, this section of Blashfield is cited in the fourth edition of *Black's Law Dictionary* in connection with the definition of "on or about," "[a]s used in statutes making it an offense to carry a weapon 'on or about' the person." *Black's Law Dictionary* 1240 (rev. 4th ed. 1968). Under the government's approach (U.S. Br. 16 n.5), the fact that a pertinent section of *Black's* cites Blashfield gives that source particular significance.

[13] *United States v. Holifield*, 956 F.2d 665 (7th Cir. 1992), involved neither section 924(c)(1) (or any other gun statute) nor an "immediate access" standard; it concerned whether a protective search of a locked glove compartment in a stopped vehicle was valid under the Fourth Amendment. *Id.* at 666, 668-69. *State v. Walton*, 429 N.W.2d 133 (Iowa 1988), involved an *unlocked and open* glove compartment, as the defendant was arrested when he opened the glove compartment to retrieve his driver's license and the arresting officer spotted a gun "in plain view" in the open glove compartment. *Id.* at 133. And, in *Ensor v. State*, 403 So. 2d 349, 354 (Fla. 1981), the Court's suggestion that "generally," a gun in a glove compartment, whether locked or unlocked,

In sum, this Court should reverse petitioner's section 924(c)(1) conviction outright, since — under either construction proposed by petitioner — it is clear that petitioner did not "carr[y] a firearm" by having it in the locked glove compartment of a pickup truck.

## CONCLUSION

For the foregoing reasons, and those stated in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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may be "on or about the person" was necessarily *dicta*, since the gun in question was under the passenger's floormat, not in a glove compartment.

Supreme Court, U.S.
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JAN 23 1998
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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

(6)

No. 96-8837
Donald E. Cleveland,
Enrique Gray-Santana
Petitioners,

v.

United States of America,
Respondent

No. 96-1654
Frank J. Muscarello,
Petitioner,

v.

United States of America,
Respondent

On Writs of Certiorari to the United States
Courts of Appeals for the First and Fifth Circuits

# BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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## INTERESTS OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nationwide, non-profit voluntary association of criminal defense lawyers founded in 1958 with a membership of more than 9,000 attorneys. NACDL is affiliated with 68 state and local criminal defense organizations with which it works cooperatively on issues related to criminal law and procedure, and thus, it speaks for more than 28,000 criminal defense lawyers nationwide. Among NACDL's objectives is to ensure the proper administration of criminal justice, and to promote fair and consistent application of sentencing laws.

Families Against Mandatory Minimums Foundation ("FAMM") is a nonprofit, nonpartisan, educational association that conducts research and engages in advocacy regarding mandatory minimum sentencing laws. FAMM argues that such laws, of which 18 U.S.C. § 924(c) is a prominent example, are expensive and inefficient, perpetuate unwarranted and unjust sentencing disparities, and transfer the sentencing function from the judiciary to the prosecution. Founded in 1991, FAMM has 33,103 members nationwide with 36 chapters in 26 states and the District of Columbia. FAMM does not contend that crime should go unpunished, but that the punishment should fit the crime.

## I. SUMMARY OF ARGUMENT

The two cases consolidated for review by this Court are indicative not only of a split in the Circuits but of a pervasive confusion over the meaning of a simple phrase--"carries a firearm" -- contained within 18 U.S.C. § 924(c)(1).

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[1]In accordance with Supreme Court Rule 37.6, amici curiae represent that no party other than counsel for amici authored this brief in whole or in part, and no person or entity, other than amici, has made a monetary contribution to the preparation or submission of this brief. The petitioners and respondent have consented to the filing of this brief, and amici have filed the letters of consent with the Clerk of the Court, pursuant to Supreme Court Rule 37.3.

Notwithstanding the extensive linguistic, etymological, and logical gymnastics that have engaged the Courts of Appeals, this is a phrase with an obvious ordinary and natural meaning. In the relevant context of firearms, to carry means, simply, to bear upon one's person.

This contextual definition, listed under "carry arms or weapons" in BLACK'S LAW DICTIONARY 214 (6th ed. 1990), is the first and most natural meaning ascribed to the phrase by the drafters of § 924(c)(1) and other related legislation, and by this Court. *See Smith v. United States*, 508 U.S. 223, 236 (1993) ("so too would a defendant 'carry' the firearm by keeping it on his person"). Further, it fits best with this Court's instruction in *Bailey v. United States*, 116 S. Ct. 501 (1995), that each statutory term in § 924(c)(1) must be construed to have a separate meaning. Similarly, it avoids confusing overlap with many other federal statutes that employ these related terms. The best way to distinguish "carry" from "use," "transport," or "possess" is to confine the term to its ordinary and natural meaning. Such a reading makes perfect sense because as one court recently put it, "criminals who pack heat are obviously much more dangerous than those who do not." *United States v. Foster*, ___ F.3d. ___ 1998 WL 2521 at *1 (9th Cir. 1998).

Moreover, the simple definition of "carry" proposed by *amici* is easy to apply, and will discourage the lower courts from stretching statutory text by policy-driven teleological reasoning. A clear definition of "carry" will properly complete the interpretive enterprise begun by this Court in *Bailey*. Finally, the ordinary and narrow construction of § 924(c)(1) best comports with the Rule of Lenity.



## II. ARGUMENT

### A. INTRODUCTION

Two years ago, in *Bailey v. United States*, ___ U.S. ___, 116 S.Ct. 501 (1995), this Court addressed two issues that had troubled lower courts interpreting 18 U.S.C. § 924(c)(1),[2] a deceptively simple statute that, "has been the source of much perplexity in the courts." 116 S.Ct., at 505. The first issue was the specific meaning of the statutory phrase, "uses . . . a firearm." This Court's specific answer to that question was that the term should be interpreted quite narrowly: "the Government must show that the defendant actively employed the firearm during and in relation to the predicate crime." *Id.* at 509.

The second issue was perhaps less straightforward, but *Bailey* offered genuine guidance in how to resolve it. That issue is one of method -- how should courts interpret the potentially ambiguous terms "use" and "carry" in a criminal statute? A pessimist might suggest that the current split in the Circuits reaffirms the truth of what Justice Scalia has recently conceded is "a sad commentary": "that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation." HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1169 (William N. Eskridge, Jr. & Phillip P. Frickey eds. 1994), cited in ANTONIN

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[2] 18 U.S.C.§ 924(c)(1) provides in relevant part:

> Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years.

SCALIA, ET AL. A MATTER OF INTERPRETATION 14 (1997). Closer analysis of *Bailey*, however, offers a clear path through the thicket. Indeed, proper application of quite basic methods of statutory construction compels the conclusion that the lower courts have simply misunderstood that, especially in the context of criminal statutes, "statutory construction means...that the Court can *construe* statutes but not that it can *construct* them." *Rosenberg v. Fleuti*, 374 U.S. 449 (1963) (dissent of Clark, J., joined by Harlan, Stewart, and White, JJ.).

There may very well be compelling public policy reasons to punish harshly those who transport, or possess, even constructively, firearms, "during and in relation to any crime of violence or drug trafficking crime." It appears that *post-Bailey*, the lower federal courts have been swayed by just such considerations. *See United States v. Miller*, 84 F.3d 1244, 1259 (10th Cir. 1996) (discussing numerous cases from the First, Second, Sixth, Seventh, Ninth, and Eleventh Circuits that applied a broader interpretation of "carry a firearm" following *Bailey*); *see also* Note & Comment, *The Aftermath of Bailey v. United States: Should Possession Replace Carry and Use Under 18 U.S.C. § 924(c)(1)?*, 5 J. L.& POL'Y 679, 697 (1997) ("It is clear that after *Bailey*, the Second Circuit, along with many others, is defining 'carry' more broadly."). Policy justifications, however, cannot legitimize judicial interpretations that are unsupported by the language of the statute, its context, and its history.

It is not surprising that the Courts of Appeals are as hopelessly tangled and divided over the proper meaning of "carries a firearm" as they are. As in the years before *Bailey* when some of the lower courts used § 924(c)(1) as a cudgel, expanding "use a firearm" beyond the reasonable, the lower courts have simply exceeded their interpretive charge. Their lack of consensus is the inevitable result of unwarranted straying from the ordinary, core meaning of the phrase, in the process ignoring venerable principles for the construction of



criminal statutes.

## B. THE ORDINARY AND NATURAL MEANING OF THE PHRASE "CARRY A FIREARM" IS LIMITED TO THE PERSON

This Court has been clearer about nothing than that the starting point of statutory interpretation must be the language of the statute, which is to be interpreted according to "its 'ordinary or natural' meaning." *Bailey*, ___ U.S., at ___, 116 S. Ct., at 506 (quoting *Smith v. United States*, 508 U.S. 223, 228 (1993)). The widely divergent etymological conclusions of the Courts of Appeals could indicate that a strict dictionary-based solution to this problem is elusive. One difficulty is that the English word "carry" seems to be susceptible of a number of "ordinary and natural" meanings. It can mean "[t]o wear, bear . . . upon the person or in the clothing or in a pocket, for the purpose of use . . . ." BLACK'S LAW DICTIONARY 214 (6th ed. 1990). Or, as the Court of Appeals for the First Circuit has held, "carry" could essentially mean "transport": "moving to a location some distance away . . . . by car or cart . . . in ref[erence] to ...loads on trucks, wagons, planes, ships, or even beasts of burden." *Cleveland v. United States*, 106 F.3d 1056, 1066 (1st Cir. 1997) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 343 (3d ed. 1971)). *See also id.*, 106 F.3d at 1068 ("the ordinary meaning of the term 'carry' includes transport by vehicle"). Or it could even mean to communicate (as in "carry a tune"), have in stock (as when a store "carries inventory"), prolong (as in a lesson that is "carried over" to the next day), or to be infectious (as in "carrying a disease").

But the presence of multiple meanings in a dictionary hardly creates a dilemma, in itself, since a trip to the

dictionary should not be undertaken with a mind cleansed of any knowledge of context. As this Court said in *Bailey*, statutory language "draws meaning from its context, and we will look not only to the word itself." 116 S.Ct., at 505. *See also id.* at 506 ("[T]he meaning of statutory language, plain or not, depends on context.") (citations omitted). Thus, the phrase "carries a firearm" has a more limited, more specific meaning than the word "carry" has in general. We know this because we recognize that the interpretive task is not to determine the meaning of the word "carry" in general but only its meaning in relation to a firearm.

Of the principal dictionary definitions of "carry," only one specifically links the verb with the object -- a firearm -- relevant to these cases. Black's Law Dictionary, in fact, defines not only the verb but the entire phrase "carry arms or weapons." This phrase is best seen as essentially a legal term of art signifying, as Black's puts it: "To wear, bear, or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person." BLACK'S LAW DICTIONARY, *supra*, at 214. *See also* WEBSTER'S II NEW COLLEGE DICTIONARY, at 170 (1995) (carry means "[t]o have or keep on one's person [*carry* a gun]"). That is, "carry a firearm" means, in Judge Kozinski's colorful phrase, "to pack heat." *United States v. Foster*, ___ F.3d. ___, 1998 WL 2521, *1 (9th Cir. 1998). It does not mean to have available, or to store, or to transport, or to possess. The meaning is simple and clear: to wear or bear on the person.

This Court's own passing reference, in *Bailey*, to the phrase "carry a firearm" underscores that the core, "ordinary and natural" meaning of the phrase is "on the person." As the Court explained the difference between "using" and "carrying" a firearm, the Court described carrying in a narrow way. "[A] firearm can be carried without being used,



e.g., when an offender keeps a gun *hidden in his clothing* throughout a drug transaction." 116 S.Ct., at 507 (emphasis added). Similarly, in *Smith v. United States*, 508 U.S. 223, 236 (1993), the Court made another passing reference to "carry a firearm" and in doing so revealed the core, "ordinary and natural" meaning of the phrase.

> Just as a defendant may 'use' a firearm within the meaning of § 924(c)(1) by trading it for drugs or using it to shoot someone, so too would a defendant 'carry' the firearm *by keeping it on his person* whether he intends to exchange it for cocaine or fire it in self-defense.

508 U.S., at 236 (emphasis added).

The "ordinary and natural" meaning Black's Law Dictionary ascribes to "carry a firearm" mandates that convictions in both the instant cases should be overturned. A firearm transported in a car's trunk or in a glovebox is not being carried on the person. That much is clear.[3] Given the direct relevance of this specific, legal definition, this Court should simply stop here. The text is clear, and its "ordinary and natural" meaning, in context, is clearly set out in the most relevant legal dictionary. There is little reason to excavate further, and the courts that have done so have reaped only confusion.

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[3]Nor is a firearm transported in a trunk or glovebox being carried "about the person." The best meaning of that phrase connotes the possession of a firearm in a backpack, or case, or coat pocket or some other container that is itself on the person or held by the person. *See, e.g., Diffey v. State*, 86 Ala. 66, 5 So. 576 (1888); *Avery v. Commonwealth*, 223 Ky. 248, 3 S.W.2d 624 (1928) (in receptacle attached to or carried by the person).

## C. OTHER INTERPRETIVE TOOLS SUPPORT THE PROPOSITION THAT "CARRY A FIREARM" MEANS "ON THE PERSON"

If the Court wishes to peek behind the curtain of "ordinary and natural" meaning, the equation of "carry a firearm" with "on the person" is bolstered further.

### 1. The Placement and Purpose of "Carry a Firearm" in the Statutory Scheme Confines Its Meaning to the Person

The "ordinary and natural" meaning of "carry a firearm" set out in Black's Law Dictionary fits well within a more coherent and more comprehensive reading of the entire statutory scheme. This Court made very clear in *Bailey* that since Congress used two distinct terms in § 924(c)(1) they must each be construed to have a distinct meaning. *See* 116 S.Ct., at 506 ("we read § 924(c)(1) with the assumption that Congress intended each of its terms to have meaning"). There must thus be a way to use a gun without carrying it and, conversely, it should be possible to carry a gun without using it. *Bailey*, 116 S. Ct., at 507.

But it is also important to realize that although they are distinct, "use" and "carry," in this context, are cousins. The Court assumes that Congress picks its words with care. As the Latin maxim puts it, *noscitur a sociis* -- "it is known from its associates." BLACK'S LAW DICTIONARY 956 (rev. 5th ed. 1979). In this statute, it is apparent that "use" and "carry" were linked so that it was reasonable to use those words and no others. Thus, we can gain insight into the best meaning of "carry a firearm" by looking at the meaning of "use a firearm."

In *Bailey*, this Court made clear that "use a firearm" required some active and direct link to the underlying crime. Congress chose the phrase "use a firearm" rather than "have available for use" or "intend to use" in order to emphasize the requirement that the employment of the firearm have an



immediate and close connection with the underlying crime. *See* 116 S.Ct., at 507 ("In § 924(c)(1), . . . liability attaches only to cases of actual use, not intended use."). *Bailey*, then, interpreted "use a firearm" quite narrowly.

"Carry a firearm" should be similarly interpreted. That is, the best reading of the statute is that Congress intended "carry a firearm" to be akin to "use a firearm" while offering something that the latter phrase did not. The ordinary and natural meaning of "carry a firearm" suggested by Black's Law Dictionary satisfies this condition. As the definition itself makes clear, the meaning of "carry a firearm" is directly linked to using a firearm: "[t]o wear, bear, or carry [] upon the person or in the clothing or in a pocket, *for the purpose of use*, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person." BLACK'S LAW DICTIONARY 214 (6th ed. 1990) (emphasis added). Congress, to put it metaphorically, decided that the center of the statutory target was the link between the underlying crime and a firearm's "active employment," *Bailey*, 116 S.Ct., at 508, and that the next concentric circle outside the bull's eye was to have a firearm on one's person so as to have it available immediately for use. This reading would thus link "carry a firearm" to "use a firearm" by the immediacy to the perpetrator of the underlying crime that both phrases require. It would be anomalous indeed for "use a firearm" to be interpreted as containing an immediacy requirement, as this Court held in *Bailey*, and for "carry a firearm" to be construed as containing a requirement of only the thinnest reed of a connection with the underlying crime.

Moreover, this narrow reading of "carry a firearm" best fits within the most likely legislative purpose behind § 924(c)(1). As Judge Kozinski has explained, "[c]riminals who pack heat are obviously much more dangerous than those who do not." *Foster*, ___ F.3d, at ___, 1998 WL 2521, at *1. *See also id.* at *4 ("Using or carrying guns makes those crimes

more dangerous. A drug dealer who packs heat is more likely to hurt someone or provoke someone else to violence.") Section 924(c) provides for penalties that are among the harshest of any found in all of § 924. *See* Pet. Br. at 25. It is reasonable, then, to assume that what Congress sought to make unlawful was the closest of connections between firearms and other crimes.

This reading of "carry a firearm," which takes its cue from the narrow meaning of "use a firearm" and the likely legislative focus on the immediate connection between the underlying crime and the firearm itself, has an additional virtue. This virtue is that it separates the meaning of "carry a firearm" from "possess a firearm," "transport a firearm," and "store a firearm." In *Bailey*, this Court made clear that "use" must mean something different from "possess" in the context of § 924(c). *See* 116 S.Ct., at 506. The Court reached this conclusion because of "the frequent use of the term 'possess' in the gun-crime statutes to describe gun-related conduct." *Id.* The same reasoning would hold true, of course, with regard to "carry a firearm." The narrow, ordinary and natural meaning of "carry a firearm" that limits its meaning to "on the person" ensures that it will not be confused with "transport," which also appears frequently in gun-crime statutes. *See, e.g.,* 18 U.S.C. § 926A.[4] Moreover, as *Bailey* made clear, both "possess" and

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[4]The Congressional understanding that "carries a firearm" differs from "transports a firearm" is perfectly illustrated by 18 U.S.C. § 926A, which was enacted into law in 1986 and which provides in relevant part,

> Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person who is not otherwise prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to *transport* a firearm for any lawful purpose from any place where he may lawfully *possess and carry* such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle:
>
> Provided, that in the case of a vehicle without a compartment separate from the driver's compartment the firearm or ammunition shall be contained in a locked container other than the glove compartment or console.

(emphasis added).

*See also* 49 U.S.C. § 46505 (1997) ("Carrying a weapon or explosive on an aircraft") (distinguishing "to carry a dangerous weapon" in sub-section (d)(2), from "transporting a weapon" in sub-section (d)(3)).



"carry a firearm" must mean something more than "storage": "A defendant cannot be charged under § 924(c)(1) merely for storing a weapon near drugs or drug proceeds. Storage of a firearm, without its more active employment, is not reasonably distinguishable from possession." 116 S.Ct., at 508. The narrow definition of "carry a firearm" establishes the best and clearest distinction between that phrase and "possess," "transport," and "store."

### 2. The Ordinary and Natural Meaning of "Carry a Firearm" Is Simple and Easy to Apply

One of the reasons that this Court held in *Bailey* that "use a firearm" means "active employment" of a firearm, was that alternative meanings of the phrase made for confusing and inconsistent application. This same rationale supports a reading of "carry a firearm" as equivalent to "on the person."

If the meaning of "carry a firearm" is uncoupled from its traditional link to the body, then the interpretation of the phrase "carry a firearm" will turn on manipulable and difficult-to-define conceptions of accessibility and proximity. With such a loose test, as this Court recognized in *Bailey,* courts eventually fall down a slippery slope toward making unlawful

under § 924(c) practically all firearms possession in connection with a crime of violence or drug trafficking crime. "[The] proximity and accessibility standard provides almost no limitation on the kind of possession that would be criminalized; in practice, nearly every possession of a firearm by a person engaged in drug trafficking would satisfy the standard, 'thereby eras[ing] the line that the statutes, and the courts, have tried to draw.'" *Bailey*, 116 S.Ct., at 506 (quoting *United States v. McFadden*, 13 F.3d 463, 469 (1st Cir. 1994) (Breyer, C.J., dissenting)).

Even if "carry a firearm" is expanded to mean close to -- but not on -- the person, virtually unresolvable line drawing dilemmas result. Again, as this Court noted in *Bailey*, "some might argue that the offender has 'actively employed' the gun by hiding it where he can grab and use it if necessary." 116 S.Ct., at 508. Similar arguments could be made with regard to "carry a firearm." These arguments should be answered as the Court answered the analogous assertion in *Bailey*. They "create an impossible line-drawing problem. How 'at the ready' was the firearm? Within arm's reach? In the room? In the house?" 116 S.Ct., at 509. It would be senseless indeed to establish, on the one hand, a clear, narrow rule for "use" that avoids messy line-drawing difficulties of determining accessibility and proximity and then, on the other hand, to adopt a rule for "carry" that creates those same problems. An adoption of the narrow, ordinary and natural meaning of "carry a firearm" avoids these difficulties.

### 3. The Legislative History Supports the Meaning of "Carry a Firearm" as Confined to the Person

It has been noted recently that there is "mercifully little legislative history on 'carry.'" *Foster*, ___ F.3d, at ___, 1998 WL 2521, at *4, n.8. Nevertheless, the legislative history that does exist further shows that the "ordinary and natural"



meaning of "carry a firearm," as suggested by Black's Law Dictionary, was what was enacted by Congress in § 924(c)(1).

While legislative history from § 924(c)'s initial passage is not particularly illuminating, important insights can be gained from the history of the 1984 revisions, which came as a part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §1005(a), 98 Stat. 2138-2139. In particular, Congress substituted the phrase "crime of violence" for the term "felony" in order to include violent misdemeanors and to exclude non-violent felonies. *See* S. Rep. No. 225, 98th Cong., 2d Sess. 313 n.9 (1983). Additionally, Congress merged the "uses" and "carries" prongs of the statute, deleted the requirements that the firearm be used "to commit" the offense or the weapon be carried "unlawfully," and imposed instead the "during and in relation to" requirement with respect to both "uses" and "carries" liability.[5] These changes were substantial but there is absolutely no indication that the revision of the statute included a change in the understanding that carrying a firearm means to bear it on one's person. Indeed, in a footnote immediately following its explanation of the enhanced sentencing provision, the Committee Report observed:

> Evidence that the defendant had *a gun in his pocket* but did not display it, or refer to it, could nevertheless support a conviction for "carrying" a firearm in relation to the crime if from the

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[5]The 1984 amendment to § 924(c) read in pertinent part as follows:

> Whoever, during and in relation to any crime of violence, including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years.

Pub. L. No. 98-473, § 1005(a), 98 Stat. 1837, 2138, 2139.

> circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape . . . ."

S. Rep. No. 89-255, at 314 n. 10 (1983), reprinted in 1984 U.S.C.C.A.N. 3492 n. 10 (emphasis added).

Various unsuccessful attempts to amend § 924(c) over the course of the past ten years show that "carry" is generally understood both to mean something substantially more narrow than possession and, most specifically, to mean borne by a person. Although failed attempts at legislative change are in general an obviously weak indicator of legislative intent, they do seem to indicate a widely-accepted background understanding of the meaning of "carry" in this context. *See United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1985) (Marshall, C.J.) ("where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived"). A 1989 bill, for example, was aimed at "broadening" § 924(c) "to reach persons who have a firearm ... available during the commission of certain crimes, even if the firearm is not carried or used," as where "a loaded firearm is found in the dresser drawer of an apartment which the defendant utilizes in connection with his drug dealings." *See, e.g.*, S1225, 101st Cong., 1st Sess. §113 (1989) (proposing to replace "uses or carries a firearm" with "uses, carries, or *otherwise possesses* a firearm") (emphasis added); S1256, 103d Cong. 1st Sess. § 1007 (1993)(same); S2305, 102d Cong.. 2d Sess. §401 (1992) (proposing to replace "uses or carries" with "knowingly uses, carries, or otherwise possesses"). *See generally,* Clark D. Cunningham & Charles J. Fillmore, *Using Common Sense: A Linguistic Perspective on Judicial Interpretations of "Use a Firearm,"* 73 WASH. U. L.Q. 1159, 1198-1203 (1995) (describing and analyzing Congress's post-1988 efforts to expand statute to cover possession of firearm). Examples cited in debate over these bills are instructive as to the understanding of what it means to carry a firearm: "The



requirement that the firearm's use or possession be 'in relation to' the crime would preclude its application in a situation where its presence played no part in the crime, such as a gun *carried in a pocket* and never displayed or referred to in the course of a pugilistic barroom fight." S. Rep. No. 225, 98th Cong., 2d Sess. 314 n. 10 (1983) (emphasis added), reprinted in 1984 U.S.C.C.A.N. 3182, 3492 n.10. The passage also contains the following statement:

> Evidence that the defendant had a gun in his pocket but did not display it, or refer to it, could nevertheless support a conviction for 'carrying' a firearm in relation to the crime if from the circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape.

S. Rep. No. 225, at 314 n.10, reprinted in 1984 U.S.C.C.A.N. at 3492.

More recent debates and testimony demonstrate even more clearly the virtual consensus that "carry" has a substantially more narrow meaning that "possess." For example, various legislative proposals have been made to expand the reach of § 924(c)(1) beyond carry to possession. *See e.g.*, S. 1612, "A bill to provide for increased mandatory minimum sentences for criminals possessing firearms, and for other purposes" (providing for a ten year mandatory minimum sentence for "any criminal possessing a gun during and in relation to the commission of a violent or drug trafficking crime.") 142 Cong. Rec. S1976 (daily ed. March 13, 1996) (passed by the Senate on October 3, 1996, as "A bill to broaden the scope of certain firearms offenses, and for other purposes"). *See* Appendix. 142 Cong. Rec. No. 141, S12390; *see also* S.1945, "A bill to broaden the scope of certain firearms offenses" (described by its sponsor, Sen. DeWine as designed to "cover all circumstances in which a drug dealer or violent criminal is caught with a firearm" [by adding the language]

"uses or carries a firearm...or has a firearm in close proximity at the time of arrest or at the point of sale of illegal drugs") 142 Cong. Rec. S7762, 7764-5 (daily ed. July 11, 1996).

The understanding of the significant difference between "carry" and "possess," was demonstrated by the following colorful argument made by Sen. Helms, the sponsor of S. 1612:

> "As a result of the Court's [*Bailey*] decision, any thug who hides a gun under the back seat of his car, or who stashes a gun with his drugs, may now get off with a slap on the wrist . . . I believe that *mere possession* of a firearm, during the commission of a violent felony--even if the weapon is not actively used--should nonetheless be punished . . ."

142 Cong. Rec. S1976-7 (daily ed. March 13, 1996).

Although unsuccessful in his attempts to amend § 924(c)(1) in 1996, Sen. Helms, in 1997, spoke in support of S. 43, "A bill to throttle criminal use of guns," which provided that a 5-year mandatory minimum sentence shall be imposed upon any criminal *possessing* a gun during and in relation to the commission of a violent or drug trafficking crime.[6] The Senator was equally clear that "carry" was much more narrow than "possess."

> The bill I am introducing today will correct the Supreme Court's [*Bailey*] blunder, and it will crack down on gun-toting thugs who commit all manner of unspeakable crimes . . . violent felons who *possess* firearms are demonstrably

[6]If the criminal were to fire the weapon, the mandatory penalty would be elevated to 10 years. If there were a killing during the crime, the punishment would be life imprisonment or the death penalty.



> more dangerous than those who do not. . . . Current Federal law provides that a person who, during a Federal crime of violence or drug trafficking crime, uses or carries a firearm shall be sentenced to 5 years in prison . . . . But along came the Supreme Court's unwise decision thwarting prosecutors' effective use of this statute. The Court . . . interpreted the law to require that a violent felon actively employ a firearm as a precondition of receiving an additional 5-year sentence. The Court held that the firearm must be brandished, fired or otherwise actively used; so if a *criminal merely possesses* a firearm, but doesn't fire or otherwise use it, he escapes the additional 5 year penalty.

143 Cong. Rec. S405 (daily ed. January 21, 1997) (emphasis added).

Sen. Helms, of course, does not speak for the entire Congress, or even necessarily the Senate. This Court, however, should take note of the fact that the entire Congress appears to agree that the current statute does not punish the functional equivalent of possession of a firearm and that any expansion of the meaning of "carry" in § 924(c)(1) should be a legislative task. Bills that have passed both the House and the Senate in the past two years further show a consensus that the phrase "carry a firearm" is significantly narrower than "possess a firearm." *See* Appendix (reprinting relevant portions of bills).

Discussion over why it might be necessary to add a possession prong to § 924(c)(1) has also been surprisingly probative of how "carry" is generally understood. Indeed, even testimony by federal prosecutors has confirmed the general proposition that "carry" has a significantly narrower meaning than "possess." On May 8, 1997, Kevin DiGregory, Deputy

Assistant Attorney General, General Criminal Division of the Department of Justice, testified before the Senate Committee on the Judiciary on the general subjects of *Bailey* and 18 U.S.C. § 924(c). Federal Information Systems Corporation, Federal News Service, Section: In the News, Prepared Statement of Kevin DiGregory; May 8, 1997. Mr DiGregory described various legislative proposals then pending in the Senate.[7]

In later testimory the same day, both Mr. DiGregory and another witness, Walter C. Holton, Jr., United States Attorney for the Middle District of North Carolina argued that the substitution of the word "possess" would eliminate the need for "use" and "carry." More specifically, though, the following dialogue indicated the basic difference between "carry" and "possess":

> Sen. Sessions: ...Mr. Holton, I think if you were prosecuting a case and the person actually carried the gun during the drug offense, you would charge that and possess too. You'd charge carry and possess. Perhaps if it was under the seat of the car, you would probably charge it just possess. Do you think?
>
> Mr. Holton: I think that's a fair distinction--

*Id.* at 23.

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[7]The first, S. 362, introduced by Senators Leahy and Biden and supported by the Administration, simply substituted the phrase "possess a firearm" for "uses or carries". In contrast, the formulation of S.43 and S.3, proposed by Senators Helms, Hatch and DeWine, added the term "possess" to "uses or carries." Finally, S.15, also proposed by Senators Leahy, Biden and others, would also substitute "possesses" for "uses or carries" but it also change "in relation to " to "in close proximity to." *Id.* at 2.



## D. THE ATTEMPT BY THE COURTS OF APPEALS TO EXTEND THE MEANING OF "CARRY" BEYOND THE PERSON HAS LED TO UNNECESSARY CONFUSION AND COMPLEXITY

In comparison to the natural, reasonable reading of "carry a firearm" as meaning "on the person," it is worth considering the mistaken reading of the statute performed by most of the Courts of Appeals. Rather than depending on the core, ordinary and natural meaning of "carry a firearm," some Courts of Appeals have equated the terms "carry" and "transport." They have achieved this result by, first, divorcing "carry" from its relevant object--"firearm." They then rely upon what appears to be a teleological, policy-based, and arbitrary choice among dictionary definitions. *See, e.g., Cleveland*, 106 F.3d at 1067 (holding that Black's "on the person" definition is "inapposite" because of doubts that Congress would mean to exclude defendant who "transports" the gun in his car). The first part of this method has been expressly disavowed by this Court. *See Deal v. United States*, 508 U.S. 129, 133 (1993) (criticizing "the regrettable penchant for construing words in isolation.") The second is patently improper.

The feat of interpretive legerdemain tends to lead to a focus on movement because the severance from plain meaning necessitates a point of distinction (other than the body) between "carry" and "possess." But the recourse to movement leads to absurd results. It is absurd, for example, to conclude that Congress intended to punish a person who sells drugs while holding a gun in his jacket pocket while walking but not to punish him if he stands still. The danger that Congress sought to address was not that of movement of weapons. As noted above, "transportation" is dealt with elsewhere in any event. *See, e.g.*, 18 U.S.C. §§ 922(a)(1)(A), 922(a)(1)(B), 922(a)(2), 922(a)(3), 922(a)(4), 922(a)(5), 922(e), 922(f)(1), 922(h),

922(i), 922(j), 922(k), 922(n), 924(b), 925(a)(1), 925(a)(2), 925(a)(4). *See also Foster*, ___ F.3d, at ___, 1998 WL 2521, at *3. Rather, the focus of § 924(c)(1) was clearly the close connection between firearms and persons committing crimes of violence or drug trafficking. Movement was not the key.

This can be illustrated with a couple of straightforward hypotheticals. An engineer in the engine of a train could not reasonably be said to be "carrying" a firearm he has stored in a compartment in the caboose a half-mile away. Nor could a captain standing on the bridge of an ocean liner be said to be "carrying" a firearm he has stashed among his belongings in his quarters several decks below. In both cases, the person possessing the firearm is moving it along with him. In both cases, the firearm is being "move[d] while supporting," is being "move[d] an appreciable distance without dragging," and is being "sustain[ed] as a burden or a load and [brought] along to another place." *Cleveland*, 106 F.3d, at 1066 (quoting WEBSTER'S THIRD, *supra*, at 343). Yet it is obviously inconsistent with the "plain meaning" of "carry" in this specific context to sweep these hypotheticals within its purview. The carry-as-transportation logic of the First and Fifth Circuits in the cases below would render both the ship captain and the train engineer criminally liable under § 924(c)(1) if they committed a relevant underlying crime in the train engine or on the ship's bridge, even if the firearms were a great distance away but still on the same moving vehicle. To impose liability in such a situation is incongruous with the purpose of the statute.

The incorrect focus on movement also tends to implicate yet another complicated requirement--that of "immediate accessibility." Some courts have seemed to rely exclusively on this concept, *see United States v. Hernandez*, 80 F.3d 1253, 1257 (9th Cir. 1996) (concluding that the "ordinary and natural" meaning requires immediate availability for use), while others have combined it with the transport element. *See*



*United States v. Ramirez-Ferrer*, 82 F. 3d 1149, 1154 (1st Cir. 1996); *cert. denied*, 117 S. Ct. 405 (1996) (loaded gun on a boat within "easy reach" held to be carried); *United States v. Riascos-Suarez*, 73 F.3d 616, 623 (6th Cir. 1996) (finding gun transported in a vehicle and "within reach and immediately available for use" sufficient evidence of "carrying"); *but see United States v. Mitchell*, 104 F.3d 649, 653 (4th Cir. 1997) ("plain meaning" does not require that firearm be readily accessible). As noted above, however, the problem of accessibility only arises if one strays from the core (on the person) definition. The best way to avoid it is simply to rely on the plain meaning of the statutory term.

Accessibility provides a possible way to *expand* the plain and ordinary meaning but, like mobility, it raises significant problems. Most obviously, it creates a line-drawing problem between "carry" and "possess." A gun on a table in the living room is perhaps immediately accessible and is certainly possessed. It would not, however, ordinarily be thought of as "carried."

Those courts that have postulated locomotion or immediate accessibility as core meanings of "carry a firearm" have, so to speak, put the cart before the horse. To the extent that these concepts may inhere in the phrase "carry a firearm" it is only because the core meaning of that phrase is "on the person."

One additional factor argues against an adoption of the movement-based construction of § 924(c)(1). Under such a reading, "carry a firearm" would mean something different when a defendant is in his house, or on the sidewalk, or in a store or park or office building, from when he steps into a car or other vehicle. *See Muscarello*, 106 F.3d at 639 ("[W]e observe that what constitutes 'carrying' under § 924(c) when the firearm is possessed in the motor vehicle differs substantially from what constitutes carrying a firearm in a non-vehicle situation."). Outside the vehicle, movement or

potential movement is not part of the definition. Inside the car, movement becomes the touchstone. Not only is such a result messy, it flies in the face of any reasonable method of statutory interpretation -- why would "carry" mean something different inside a car any more than "use" would?

The carry-as-transportation construction also creates anomalies. A defendant who sold drugs in his living room, with a gun in an adjacent room but out of sight, would not be liable under this construction of § 924(c)(1). Yet if the defendant sold drugs from a car, the carry-as-transportation reading of § 924(c) would make unlawful the presence of a firearm that was, say, in the trunk, even if it was no more accessible to the defendant in the driver's seat than the gun in the adjacent room was to the defendant in the living room. The ordinary and natural reading of "carry" to mean "on the person" would be the same inside or outside a car, on board a ship or on shore, and inside one's abode or outside on the sidewalk.

## E. A NARROW READING OF "CARRY A FIREARM" IS REQUIRED BY THE RULE OF LENITY

Even if the Court believes that the sum of these arguments do not remove all uncertainty with regard to the best reading of "carry a firearm" in § 924(c)(1), there should be little doubt that the narrow "on the person" reading is a principal contestant. Not only does it comport with the most relevant dictionary meanings, it also makes sense within the statutory scheme, is easy and simple to apply, and is most closely aligned with evidence from the legislative history. In such a situation, any remaining doubt that this Court should adopt a narrow reading should be resolved by the Rule of Lenity.

This "venerable rule," *Smith*, 508 U.S., at 239, requiring that "penal laws are to be construed strictly, is perhaps not



much less old than construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION 29 (1997) ("The rule of lenity is almost as old as the common law itself."). As Chief Justice Marshall explained, the Rule "is founded on the tenderness of the law for the rights of individuals; and on the plain principle, that the power of punishment is vested in the legislature, not in the judicial department." *Id.* Thus, the Rule "insists that only the legislature define crime, and that the definition be clear and precise before courts may impose punishment." Sarah Newland, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197, 201 (1994). The Rule also emphasizes that the accused should receive fair warning that her conduct falls within the statutory prohibition. *Id.* As Justice Holmes taught, "it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). *See also* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331, 413-14 (1991) (The Rule of Lenity "serves the representation-reinforcing goal of protecting a relatively powerless group [people accused of committing crimes] and the normativist goal of injecting due process values of notice, fairness, and proportionality into the political process.").

Importantly, the Rule of Lenity provides a check on judicial activism. It is often tempting for courts to expand the reach of a criminal statute, ever so slightly, in order to cover the conduct of a defendant whose conduct falls just outside the express language of a criminal statute. Not holding responsible someone just barely beyond the express language may seem unjust, or illogical. Indeed, the courts interpreting § 924(c)(1) might be rightly charged with such well-intentioned, but misguided, expansion. *See, e.g., United States v. Cleveland*, 106 F.3d 1056, 1067 (1st Cir. 1997) ("We strongly doubt . . .

that Congress . . . meant to exclude a defendant who transports the gun in his car, rather than on his person, for use in a drug transaction."). As Chief Justice Marshall explained, the Rule of Lenity seeks to guard against this very natural impulse:

> It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.

*Wiltberger*, 18 U.S., at 96.

The Court's more recent pronouncements make it clear that the Rule of Lenity continues to hold an important place in the Court's interpretive practice. This Court explained in *United States v. Bass*, 404 U.S. 336 (1971) that "'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is *clear and definite*.' *Id.* at 347 (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952) (emphasis added)). The Court thus harkened back to Justice Frankfurter's language in *C.I.T.*, in which he explained that the Rule of Lenity should apply when a statute "cannot be said to be decisively clear on its face one way or another." 344 U.S., at 224. *See also Bell v. United States*, 349 U.S. 81, 84 (1955) (Rule of Lenity should apply "if Congress does not fix the punishment for a federal offense clearly and without ambiguity."); Also in *Bass*, this Court depended on the Rule of Lenity because Congress had not "'plainly and unmistakably'" spoken. 404 U.S., at 348 (quoting *United States v. Gradwell*, 243 U.S. 476, 485 (1917). Applied to the instant case, this language should be extremely helpful. Even at best, the government's reading of § 924(c) can hardly be said to be "clear and definite." Nor can, even at best,



the government's construction be fairly said to be "decisively clear" or "plain[] and unmistak[en]."

To be sure, this Court has stated that the Rule of Lenity does not hold Congress to an impossible level of specificity. *See* SCALIA, *supra*, at 28 ("Every statute that comes into litigation is to some degree 'ambiguous.'"). In *Smith*, for example, this Court stated that the Rule should come into play most usually after other tools of statutory construction have been exhausted. 508 U.S., at 239-40. Thus in *Smith*, the Court decided that "use [of] a firearm" included the use of it for barter, declining to use the Rule of Lenity as the basis for a more narrow reading. The Court reached its conclusion because the government's proposed construction fell "squarely within the common usage and dictionary definitions" of the statutory phrase and because "Congress affirmatively demonstrated that it meant to include transactions" like the defendant's in that case. 508 U.S., at 240.

The government's proposed broad reading of § 924(c)(1) in the instant case meets neither of these conditions. Congress did not affirmatively demonstrate that "carry a firearm" meant to transport it in a vehicle. Moreover, as argued above, the "transportation" interpretation of § 924(c)(1) would fall outside the common usage and most relevant dictionary meanings of "carry a firearm."

Moreover, in describing why the Rule of Lenity should not apply in *Smith*, the Court in effect offered justifications for why it should apply in the present case. The Court noted that "the *mere possibility* of articulating a narrower construction . . . does not by itself make the rule of lenity applicable." 508 U.S., at 239 (emphasis added). The Court also observed that "the rule of lenity 'cannot dictate an *implausible* interpretation of a statute, nor one *at odds* with the generally accepted contemporary meaning of a term.'" *Id.*, at 240 (quoting *Taylor v. United States*, 495 U.S. 575, 596 (1990)) (emphases added). The Court held that a definition of "use a firearm" that did not

include bartering would "*do[] violence* not only to the structure and language of the statute but its purpose as well." 508 U.S., at 240.

These descriptions of when the Rule should not apply strengthen the case for its application here. There can be no question, given the strong arguments supporting an "on the person" construction of "carry a firearm," that there is more than a "mere possibility" of articulating a narrow construction of the phrase. Similarly, no one could reasonably argue that a definition that fits squarely within the most relevant dictionary meaning is "implausible" or "at odds" with generally accepted meanings. And as demonstrated above, a narrow reading of "carry a firearm" hardly "does violence" to the structure, language, and purpose of § 924(c)(1). On the contrary, a narrow reading best reflects an attention to these touchstones of statutory interpretation.



## IV. CONCLUSION

For the foregoing reasons, the judgments of the Courts of Appeals should be reversed.

Respectfully submitted.

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## APPENDIX

S. 1612 passed the Senate on October 3, 1996 in the following, simplified form:

> " . . . (a) In General.--Sections 924(c)(1) and 929(a)(1) of title 18, United States Code, are each amended by striking "uses or carries" and inserting "possesses."

"A bill to broaden the scope of certain firearms offenses, and for other purposes," 142 Cong. Rec. S12390 (daily ed. October 3, 1996) (other text of bill omitted).

S. 191, a descendant of S.43 proposed by Sen. Helms, passed the Senate in November 1997 in the following (excerpted) form:

> (a) IN GENERAL- Section 924(c) of title 18, United States Code, is amended--
> (1) by striking '(c)' and all that follows through '(2)' and inserting the following:
> '(c) POSSESSION OF FIREARM DURING COMMISSION OF CRIME OF VIOLENCE OR DRUG TRAFFICKING CRIME-
> '(1) TERM OF IMPRISONMENT-
> '(A) IN GENERAL- Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which a person may be prosecuted in a court of the

United States, uses or carries a firearm, *or who, in furtherance of any such crime, possesses a firearm,* shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--
'(i) be sentenced to a term of imprisonment of not less than 5 years . . . .

"The Gun Act of 1997", 143 Cong. Rec. S12712 (daily ed. November 13, 1997) (emphasis added).

Legislation proposed in the House of Representatives has similarly been aimed at "possession," deriving from the apparent understanding that "carry" is a much narrower concept. *See* H.R. 424, "A bill to provide for increased mandatory minimum sentences for criminals possessing firearms, and for other purposes," one version of which, introduced on January 16, 1997, provided in relevant part:

Section 924(c)(1) of title 18, United States Code, is amended to read as follows:

"(c)(1)(A) A person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, possesses a firearm shall, in addition to the punishment provided for such crime of violence or drug trafficking crime-
"(i) be imprisoned not less than 10 years;
"(ii) if the firearm is discharged during and



in relation to the crime, be imprisoned not less than 20 years; and
"(iii) if the death of a person results, be punished by death or by imprisonment for life . . ."

A later version, which was reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed on October 24, 1997, provided that:

Section 924(c) of title 18, United States Code, is amended- . . .
(2) by striking paragraph (1) and inserting the following:
"(1) A person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States-
(A) possesses a firearm in furtherance of the crime, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 10 years;
(B) brandishes a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 15 years; or
(C) discharges a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 20 years . . ."

Report No. 105-344.